Supreme Court, U.S.
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NO. 95-50790

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DWAINE GANYO,

PETITIONER

VS.

SEGUIN INDEPENDENT SCHOOL DISTRICT, JAMES LEHMAN, MILTON WITT, TIMOTHY FOX, NANCY EWALD, BILL FENNELL, RAY SIMICEK, AND LIONEL (SKIP) MENO, TEXAS COMMISSIONER OF EDUCATION,

RESPONDENT

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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ORAL ARGUMENT REQUESTED

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the District Court's granting of Summary Judgment to Respondent Seguin Independent School District, its officers and employees, with regard to Petitioner's First Amendment freedom of speech claim, and his retaliation claim under the Rehabilitation Act when Respondents terminated Petitioner for his refusal to be coerced into signing his name to a qualitative statement containing an opinion that he did not believe to be true and where such coercion directly resulted from his making a complaint within the aegis of the Rehabilitation Act.

LIST OF PARTIES

The undersigned counsel of record certifies that the following are the parties to the judgment which is sought to be reviewed in this petition:

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OPINIONS BELOW

The recommendations of the United States Magistrate Judge were issued on December 23, 1993, and February 14, 1995, and are unpublished. They are reproduced at App., p. 29, 9.

A final judgment and Order of the District Court were issued on September 28, 1995, and were unpublished. They are reproduced at App., p. 4, 6.

On July 18, 1996, the Court of Appeals summarily affirmed the District Court's judgment without addressing Petitioner's arguments. The Court's decision was unpublished and is reproduced at App., p. 1.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on July 18, 1996 (App., p. 1). This Court has jurisdiction pursuant to 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. U.S. Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

2. U.S. Constitution Amendment XIV., Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 29 U.S.C. Section 794(a):

> Promulgation of nondiscriminatory rules and regulations; copies to appropriate committees.
>
> No otherwise qualified individual with a disability in the United

States, as defined in section 7(8) [29 U.S.C. Section 706(8)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service....

4. 45 C.F.R. Section 80.7(e):

Intimidatory or retaliatory acts prohibited.

No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

5. 45 C.F.R. Section 84.61:

Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in Sections 80.6 through 80.10 and Part 81 of this Title.

STATEMENT OF THE CASE

A. Nature of the Case

This is an employment case primarily raising issues under the First Amendment and the Rehabilitation Act. The District Court granted a summary judgment on behalf of the local defendants and granted a Motion to Dismiss filed by the State Commissioner of Education.

Dr. Ganyo was terminated for the express reason that he refused to sign a statement with which he did not agree; thus this case presents the issue of the proper application of Connick v. Myers, 461 U.S. 138 (1983), in the context of involuntary expression coerced by a government employer. The lower courts have failed to address Petitioner's right to refuse to speak, a right established by this Court. E.g. Riley v. National Federation of the Blind, 108 S.Ct. 2667, 2677-78 (1988).

Further, the Court of Appeals left standing the Magistrate Judge's ruling that Dr. Ganyo has no standing to sue under the Rehabilitation Act because he is not himself disabled. Dr. Ganyo had alleged that his termination resulted from a complaint he had made to the Texas Education Agency regarding the education of disabled students.

B. Facts of the Case

Dr. Ganyo is a highly experienced and dedicated teacher of learning disabled students, who was employed by Seguin ISD for the 1991-92 school year. Dr. Ganyo believed that his ability to serve his students had been frustrated by ill-considered scheduling decisions made by his principal, which

required him, for about one-half the day, to teach a full period lesson to one group of special education students while supposedly providing ''drop-in'' type services to other special education students arriving throughout the class for context mastery instruction. While he performed the duties assigned to him, he complained locally and eventually filed a complaint with the Texas Education Agency, asserting that the combination of classes and duties made it impossible for him to fulfill his students' individual education plans and that his students were suffering (App., p. 49, 62). The Agency discussed the matter with Dr. Ganyo's supervisors, but not with Dr. Ganyo, and issued "findings" essentially blaming Dr. Ganyo for a violation of law and demanding unspecified ''corrective action.'' (App., p. 62-64, 11). District officials, with the concurrence of the TEA investigator, decided to demand an ''assurance" from Dr. Ganyo which stated: ''I will provide the needed instruction to special education students assigned to me as required in their Individual Education Plans.'' (App., p. 55).

Dr. Ganyo did not believe that the statement was true because he did not believe that he could do as stated, particularly objecting to the word ''needed.'' For the express reason that he refused to sign this "assurance," Dr. Ganyo was terminated (App., p. 64; 65).[1]

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[1] The statement of facts set forth in the Magistrate Judge's Recommendation is incomplete and inaccurate, partly because it fails to note or consider most of the summary judgment evidence presented by Dr. Ganyo and improperly draws unsupportable inferences in favor of Respondents.

Contrary to the suggestion of the Magistrate Judge, there was no evidence that Dr. Ganyo was terminated because of any refusal or failure on his part to perform the duties of his position; in fact, he had given up his conference period and lunch period to work with the students. (App., p. 61). The notice of proposed termination he received from the superintendent was expressly based upon Ganyo's refusing to give "the written assurances that were requested of you ...," (App., p. 56). At the local hearing regarding his termination, counsel for the district successfully objected to evidence of any matter other than his failure to sign this document. (App., p. 77).

At this hearing before the Board of Trustees, Dr. Ganyo circled the word "needed" and objected to the assurance on that basis. Mr. Jack King, the former Chairman of the Department of Special Education at the University of Texas, testifying as an expert in an administrative hearing in this matter, testified that he did not believe that Dr. Ganyo could have honestly signed the statement demanded of him. (App., 75).

At the initial meeting with Ganyo's supervisors where it was demanded that he sign the statement, the Special Education Director was documented to have "explained the urgency and pointed out the fact that Dr. Ganyo was in fact the person who sent the letter of complaint to TEA ...." Memorandum of Principal Witt (App., p. 53). According to Ganyo, the demand that he sign the statement was made as follows:

> We have received information from TEA we're out of compliance because you say you cannot carry out your

> IEPs. You're the one who created the problem; you're the one who will solve it. So sign this letter .... I'm giving you five minutes.

(App., p. 64).

Special Education Director Cano admitted at his deposition that compliance could also have been achieved by Cano having given directives on how Ganyo was to handle the combination of classes and that Cano could then have provided an assurance to TEA that, in his opinion, the individual education plans of the students were being fulfilled. Mr. Cano admitted that no such directives had been given to Dr. Ganyo. (App., p. 72-74). The district made thus no effort to accomplish its legitimate means through regulation of Dr. Ganyo's conduct; the district sought only to coerce expression from him in direct retaliation for him having made a complaint to the Texas Education Agency.

REASONS FOR GRANTING THE PETITION

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, <u>or other matters of opinion</u> or force citizens to confess by word or act their faith therein.

<u>Virginia State Board of Education v. Barnette</u>, 63 S. Ct. 1178, 1187 (1943) (Emphasis added.) Seguin Independent School District, with the concurrence of the Texas Education Agency, decided that the orthodox opinion was that Dr. Ganyo <u>could</u> provide the "needed instruction" to his students "as required in their IEP's."

The local respondents then attempted to force Dr. Ganyo "to confess by word ... [his] faith therein." No case of this Court holds that the analysis of Connick v. Myers, supra, supersedes the absolute prohibition of governmental coercion of expression of opinion and conscience recognized in Barnette. The Court of Appeals' unwarranted attempt to extend the Connick analysis conflicts with decisions of this Court holding expressly that an individual has ''the right to refrain from speaking at all.'' Wooley v. Maynard, 97 S.Ct. 1428, 1435 (1977); Riley v. National Federation of the Blind, supra, at 2677-78.

Further, to the extent that Connick v. Myers is applicable in the context of coerced expression, this Court's supervisory role is appropriately exercised to correct the failure of the lower Court to properly apply the phase of the Connick analysis regarding the disruptive effect of an employee's speech. If employees' First Amendment rights are to be outweighed by claimed disruptions such as that in the instant case, then employees essentially have no First Amendment rights at all and Connick v. Myers is the engine of the entire destruction of the First Amendment in the context of government employment.

Further, the rush to judgment of the lower Courts herein, denying Dr. Ganyo a trial on the issue of whether he was retaliated against for filing his complaint with the Texas Education Agency, evidences a total disregard of this Court's decisions regarding summary judgment procedure. The evidence of Dr. Ganyo was to be credited and all justifiable inferences are to be made in Dr. Ganyo's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475

U.S. 574, 587-88 (1986). The courts below refused to infer that when the local respondents in one breath demanded that Dr. Ganyo sign a document and in the next breath told him that "he" was the one who complained to the Texas Education Agency, the decision to require the written assurance from Dr. Ganyo was motivated by his complaint. Moreover, it was a certainty on this record that Dr. Ganyo would not have been terminated had he not complained to TEA.

The extremity of the lower court decisions in this case is well reflected by the unaltered conclusion of the United States Magistrate Judge that Dr. Ganyo lacks standing to sue under the Rehabilitation Act because he was not, himself, disabled. The law, however, authorizes suit by ''any person aggrieved,'' 29 U.S.C. Section 794(a)(2), which is clearly sufficient to afford Dr. Ganyo standing. Clarke v. Securities Industries Association, 479 U.S. 388, 394, n.8. (1987). Moreover, the anti-retaliation regulation, 45 C.F.R. Section 80.7(e), incorporated by Section 84.61, clearly protects ''any individual,'' whether he or she be a witness, complainant or any other participant. The assertion that Dr. Ganyo lacks standing to complain of retaliation remains mystifying.

If this Court elects to leave cases such as this standing, the message will be loud and clear. Clients will have to be advised that they may be terminated for what they say or do not say. They will never have their arguments addressed by the courts in a reasoned fashion and will never have the chance to present their case to a jury. It is readily apparent that the protections of the United States Constitution would certainly suffer in the exchange. If teachers' rights of conscience

do not warrant the attention of this Court, there will be no such rights.

An apt analogy to this case would be a situation where a City Council employed a single Municipal Judge and subjected that Judge to an increasing case load of criminal cases, which resulted in the Judge eventually stating that he was unable to afford the defendants due process of law because of the case volume. The Judge, under our scenario, would continue to work overtime in an effort to handle the caseload but would continue to state to the Council and to some state agency that an additional judge needed to be hired. The City Council then demands that the Judge sign a statement that he will afford all defendants in his court the "needed" attention required to afford due process of law and will still expeditiously dispose of his docket without further assistance. The Judge refuses to sign such a statement because he does not believe that he can give the defendants due process under the circumstances. The City Council then terminates the judge. The only difference in our case is that Dr. Ganyo was seeking to protect the rights of innocent children who suffer from educational disabilities rather than criminal defendants.

In light of the authorities of this Court, it is clear that a content-based coercion of expression presents a far different constitutional issue than the voluntary, disruptive speech addressed in Connick v. Myers. The internal right of conscience, it would seem, is the most basic of constitutional freedoms. An employee should not be required to establish that his exercise of this internal aspect of integrity relates to some matter of "public interest."

Nor can the employer ever point to any real balancing factor to justify such coercion.

It should be emphasized that this is not a case where an employee is asked to verify that he will perform the duties of his position as best as he can under the circumstances. Rather, this is a blatant effort by the local defendants to force Dr. Ganyo to retract his previous statement of opinion in his complaint to the Texas Education Agency. Connick v. Myers is inapplicable to this case; the attack on Dr. Ganyo's conscience can be upheld only if supported by a compelling state interest.

At issue in this case is not simply whether the Magistrate, District Judge, and Court of Appeals were correct. The issue is rather whether due process of law applies to the courts of our nation and whether Dr. Ganyo is entitled to a reflective decision of the Courts addressing the application of the cases of this Court upon which he has relied. The decisions below have been made without addressing Dr. Ganyo's arguments or even the undisputed facts of this case. There will certainly be fewer cases filed to protect individual liberties in this country if the Courts are free to ignore the facts and a plaintiff's arguments in order to grant summary judgments and deny plaintiffs their right to trial by jury.

A. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT TO RESPONDENT SCHOOL DISTRICT, ITS OFFICERS AND EMPLOYEES.

1. Petitioner Established a Violation of his First

Amendment Rights as a Matter of Law.

The courts below did not discuss many of the facts; the Magistrate Judge repetitively mischaracterized this case as one involving whether a teacher may refuse to perform his assigned duties. Once the case was so mischaracterized the courts failed to address the authorities cited by petitioner and decided that petitioner's speech interests were outweighed by a factor properly entitled to no weight at all.

(a) Protected Nature of Speech and Silence

First, the lower courts did not dispute that Dr. Ganyo's expressions to the Texas Education Agency involved a matter of public concern. Complaints regarding the performance by government of duties imposed by federal law clearly and strongly relate to matters of public concern. See Connick v. Myers, supra at 146, 148 n. 8, discussing Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979); Davis v. Ector County, 40 F.3d 777, 782-83 (5th Cir. 1994); Brown v. Texas A & M University, 804 F.2d 327, 337 (5th Cir. 1986).

However, the nature of Dr. Ganyo's independent constitutional right to refuse to sign the statement demanded of him was entirely misevaluated below. It is established beyond doubt that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." Wooley v. Maynard, supra at 1435, relying on Virginia State Board of Education v. Barnette, supra. "[T]he First Amendment guarantees freedom of speech, a term necessarily comprising the

decision of both what to say and what not to say." Riley v. National Federation of The Blind, supra at 2677-78 (1988).

Indeed, "[t]he most obvious infringement on First Amendment Rights in the context of compelled speech occurs when individuals are forced to make a direct affirmation of belief." Washington Legal Foundation v. Massachusetts Bar Foundation, 993 F.2d 962, 977 (1st Cir. 1993). "The state may not compel a person to affirm a belief he does not hold." Pruneyard Shopping Center v. Robins, 100 S. Ct. 2035, 2049 (1980), Powell, J., concurring. Even a corporation has a "right to be free from forced association with views with which it disagrees." Pacific Gas & Electric v. P.U.C. of California, 106 S Ct. 903, 914 (1986), Burger, C.J., concurring. The government has no right to dictate "what shall be orthodox in ... matters of opinion." Id. at 920, Rehnquist, J., concurring. A constitutional violation has been found "when the government compels an individual to endorse a belief he finds repugnant." Hays County Guardian v. Supple, 969 F.2d 111, 123 (5th Cir. 1992). See also, Cal-Almond, Inc. v. U.S. Department of Agriculture, 14 F.3d 429, 435 (9th Cir. 1993); Carroll v. Blinken, 957 F.2d 991, 996 (2nd Cir. 1992) (considering the right to refuse to speak as part of "our conception of what it means to be human"); Society of Separationists, Inc. v. Herman, 939 F.2d 1207, 1215 (5th Cir. 1991). See also U.S. v. Sindel, 53 F.3d 874, 878 (8th Cir. 1995).

These principles have also been applied in employment cases.[2] Nicholson v. Gant, 816

[2]In Elrod v. Burns, 96 S.Ct. 2673, 2681 (1976), the Court noted that "freedom of

F.2d 591 (11th Cir. 1987); Sikes v. McDowell, 786 F.2d 1098 (11th Cir. 1986); Gonzalez v. Benavides, 774 F.2d 1295 (5th Cir. 1985), as explained in McAdams v. Matagorda County Appraisal District, 798 F.2d 842 (5th Cir. 1986). In McAdams the Court distinguished Gonzalez by noting that the plaintiff in that case was "in essence, required to personally, publicly avow as his own belief a matter he did not believe in." Id. at 848.

When Dr. Ganyo argued that the District could have regulated his conduct rather than his expression, the Magistrate Judge labeled the distinction as "illusory." (App., p. 22). However, this Court has repetitively held flatly to the contrary. E.g. Texas v. Johnson, 109 S.Ct. 2533, 2540-41 (1989). ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. The nonspeech element of conduct may be regulated"); Employment Div. Dep't of Human Resources v. Smith, 110 S.Ct. 1595, 1599-1600 (1990). ("The First Amendment obviously excludes all governmental regulation of religious beliefs; however, such beliefs do not excuse one from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate"), See also Id. at 1599-1600, O'Connor, J., concurring; Reynolds v. United States, 98 U.S. 145, 166-67 (1879) ("Laws ... cannot interfere with mere religious beliefs and opinions, they may with practices.")

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belief is central" to our constitutional rights and that the rule of Barnette was applicable to "the denial of public employment." See Vickery v. Jones, 856 F.Supp. 1313, 1320 n. 3 (S.D. Ill. 1994).

In R.A.V. v. City of St. Paul, 112 S.Ct. 2538, 2542, 2544 (1992), the Court observed that

> [t]he First Amendment generally prevents government proscribing speech ... or even expressive conduct ... because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.
>
> ...
>
> [N]onverbal expressive activity can be banned because of the action it entails, but not because of the idea it expresses ....

Indeed, if a statute is "directed at conduct rather than speech," some incidental content-based proscription will be enforced, Id. at 2546, but only when "there is no realistic possibility that official suppression of ideas is afoot." Id. at 2547.

The local defendants attempted to coerce, on the basis of content, statements from Dr. Ganyo which essentially would retract the complaints he had made to the Texas Education Agency. Under traditional First Amendment analysis, which should be applicable to cases of coerced expression, the district would have to show that it had selected the least intrusive means to accomplish a compelling state interest. The analysis of Connick v. Myers is not applicable in such a case and the school district and its officials have essentially conceded that other, less restrictive alternatives, existed.

(b) Causation

Since the entire scenario resulted directly and exclusively from Ganyo's complaint, there can be no doubt whatsoever that his termination was factually caused by his complaint. Moreover, surely it can be inferred from the juxtaposition of items 4 and 5 in Mr. Witt's memorandum that there was a causal connection between Dr. Ganyo making the complaint and the district's choice of solutions. (App., p. 52, 53). Can it honestly be questioned, when the school bully says: "I'm going to beat the daylights out of you; you scratched my car," that the word "because" has been implied between the two statements? Further, Special Education Director Cano testified that the original agreement with the TEA investigator to have Dr. Ganyo sign such a statement was based upon the fact that Dr. Ganyo had taken a contrary position in his complaint. (App., p. 72-74). Moreover, a desire was expressed to remove Dr. Ganyo after his complaint but before the TEA findings. (App., p. 76).

With all respect, we submit that not just a reasonable jury, but any reasonable jury would infer that respondent's decision to coerce expression from Dr. Ganyo was directly caused by the fact that he had made the complaint. Anderson v. Liberty Lobby, Inc., supra, at 255; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra, at 587-88. It can only be concluded that his complaint to the Texas Education Agency was a substantial or motivating factor in his termination. Mt. Healthy City School District v. Doyle, supra.; Click v. Copeland, supra. The lower courts' decision can not be supported.

Second, the demand for coerced expression was the express reason for termination, and thus causation is uncontested in this regard.

c) Balancing Test

Petitioner is aware of no previous case in which a court has held that any governmental interest can outweigh either the right of conscience repetitively recognized by this Court or the right of a public servant to make an official complaint, authorized by act of Congress, regarding the compliance of a governmental body with federal law. For at least 50 years the former right has been a "fixed star," admitting of no exceptions.

The progeny of Connick v. Myers, 461 U.S. 138 (1983) and Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977) have pointed to several factors in assessing the "efficiency" interest of government. Factors to weigh include whether close working relationships are necessary, the time, place and manner of the employee's activity, whether the activity can be considered hostile, abusive or insubordinate, and whether the activity impairs discipline by superiors or harmony between coworkers. Click v. Copeland, supra at 112, Matherne v. Wilson, 851 F.2d 752, 760 n. 47-8 (5th Cir. 1988). The courts below found no such "disruption" and there was no evidence presented of such.

Respondents' only assertion of "disruption" resulting from Dr. Ganyo's refusal to sign the assurance was "because without this assurance, TEA was threatening to sanction the school district." However, the lower courts failed to recognize the admitted fact that the school district's objective of obtaining compliance with TEA could have been

achieved by regulating Dr. Ganyo's conduct rather than his speech.

> "The existence of adequate content-neutral alternatives thus undercut[s] significantly any defense of [a statute directed at particular expressive content].... [T]he dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve [the governmental entity's] compelling interest."

R.A.V., supra at 2550.

Regarding petitioner's complaint to the Texas Education Agency, there seems no legitimate interest which can be asserted by respondent in the balance.

It would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because it somewhat disrupted the office. Porter v. Califano, 592 F.2d 770, 773-74 (5th Cir. 1979), quoted in Frazier v. King, supra at 826. Indeed, petitioner is aware of no case holding that the government has a legitimate interest to assert in a balance against such a report. See, Brown v. Texas A & M University, supra.

Thus far, governmental interests have been balanced against only voluntary exercises of an employee's First Amendment right to comment on matters of public concern. The test is designed only to protect the operation of government from being victimized unjustifiably by the effects of the manner in which an employee has chosen to exercise his

or her First Amendment rights. When the government decides to coerce the employee's expression where its legitimate interests may be met by less intrusive means, there is no basis to permit the government to justify its actions by alleged harm it has caused itself. There is an insufficient nexus between the employee's exercise of First Amendment rights and the interest claimed by government when any impairment of that interest has not been shown to be caused necessarily by the silence of the employee.

Further, the TEA mandate relied upon as the balancing factor below was only for "corrective action." It was the school district's idea to demand the assurance. This observation was relied upon in another Order to absolve TEA of responsibility. (App., p. 46). The suggestion that a local governmental body is justified in infringing upon the exercise of its employees' First Amendment rights merely because a state agency has told it to "do something" seems completely insupportable, to bridle expression.

The balance struck by the lower courts is similar to arguing that a political subdivision "has a compelling interest in following ... state law," which is patently wrong. Bessard v. Cal. Community College, 867 F.Sup. 1454, 1464 (E.D. Cal. 1994). Similarly, "any suggestion that the government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment." United States v. Eichman, 496 U.S. 310, (1990). "Constitutional rights may not be denied simply because of hostility to their assertion or exercise." Cox v. State of Louisiana, 85 S.Ct. 453, 462 (1965).

The courts below offered no distinction between this case and one where a teacher: (1) testifies at a due process hearing under the Individuals with Disabilities Education Act that he is unable to provide "the needed instruction to the student as required in his IEP;" (2) refuses to retract the statement and violates a directive of the district to testify to the contrary; and (3) is fired. In a very real sense, Dr. Ganyo was compelled to "bear false witness against [his] neighbor," Exodus, Ch. 20, v. 16. This Court has held that this is simply not an option available to government, and no reasonable official could have believed that it was.

2. Petitioner Had Standing Under the Rehabilitation Act and Presented Sufficient Evidence of a Violation of That Act to Withstand Summary Judgment.

In concluding that petitioner lacked standing to enforce the anti-retaliation regulation adopted under the Rehabilitation Act,[3] the courts below overlooked the language of both the statute and the regulation, as well as the express holding of the Eighth Circuit in Hoyt v. St. Mary's Rehabilitation Center, 711 F.2d 864, 867 (8th Cir. 1983). "We agree that retaliation against persons who make complaints under Section 504 is actionable." Id. at 867. The statute itself provides a cause of action "to any person aggrieved by any act or failure to act by any

[3]The Magistrate Judge addressed this issue in his recommendation regarding Commissioner Meno's Motion to Dismiss, (App., p. 39), and adopted his recommendation later as to the local defendants. (App., p. 14).

recipient of federal assistance." 29 U.S.C. Section 794(a)(2). This is clearly sufficient to afford Dr. Ganyo standing. Clarke v. Securities Industries Association, 479 U.S. 388, 394, n. 8. (1987).

The pertinent regulation prohibited discrimination "against any individual . . . because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part." 45 C.F.R. §80.7(e). The Magistrate Judge's statement that there is "simply no authority that ... the anti-retaliation provision was meant to protect anyone other than the handicapped person," is preposterous. For such authority, Dr. Ganyo will refer to the conclusions of other courts, e.g., Hoyt v. St. Mary's, supra; Ross v. Allen, 515 F. Supp. 972 (S.D.N.Y. 1981); Penney v. Town of Middleton, 888 F.Supp. 332, 339 (D.N.H. 1994), as well as the express Congressional and regulatory language. Obviously the intent of such anti-retaliation provisions is to benefit the ultimate beneficiaries of the Act, handicapped individuals, by offering protection to individuals who offer them assistance.

Dr. Ganyo's complaint to the TEA clearly protested what he viewed as discrimination, and he sought to benefit his disabled students (App., p. 49, 62). Under the lower courts' decision, a school district can fire a teacher expressly because that teacher provided testimony in support of a disabled student. Dr. Ganyo clearly had standing to sue under the Rehabilitation Act and presented amply sufficient evidence for a reasonable jury to conclude that he was retaliated against for making a complaint to the TEA. He was thus

entitled to trial by jury on his claims under 29 U.S.C. §794 and 42 U.S.C. §1983.

CONCLUSION

The State Education Agency and a local district agreed to take action which violated clearly established constitutional and federal statutory rights of Dr. Ganyo. The conduct engaged in has been prohibited to officials "high and petty" for over fifty years. The Constitution and decisions of this Court should apply to all persons, including Dr. Ganyo. The lower courts should not be permitted to silently exempt the conduct of Respondents from decisions of this Court.

The decision of the Court of Appeals conflicts with decisions of this Court and with decisions of other Courts of Appeals. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 95-50790
Summary Calendar

DWAINE GANYO

Plaintiff - Appellant,

VERSUS

SEGUIN INDEPENDENT SCHOOL DISTRICT, JAMES LEHMAN; MILTON WITT; LIONEL "SKIP" MENO, TEXAS COMMISSIONER OF EDUCATION;

Defendants - Appellees.

Appeal from the United States District Court
For the Western District of Texas

(SA-93-CV-203)

Before SMITH, BENAVIDES and DENNIS, Circuit Judges.

PER CURIAM:*

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*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local

Dwaine Ganyo appeals from the district court's granting of summary judgment in favor of defendants-appellees. Ganyo contends that the district court erred by rendering judgment that Ganyo's rights under the First and Fourteenth Amendments had not been violated; he was not terminated in retaliation for filing his complaint with the TEA; he lacked standing to sue under the Rehabilitation Act, 29 U.S.C. § 794; and committed other alleged errors.

We have reviewed the record, the district court's order granting summary judgment, the memorandum and recommendation of the magistrate judge, and Ganyo's arguments on appeal. We find no reversible error. Accordingly, the judgment of the district court is AFFIRMED.

Rule 47.5.4.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-50790

DWAINE GANYO

Plaintiff - Appellant

v.

SEGUIN INDEPENDENT SCHOOL DISTRICT; JAMES LEHMAN; MILTON WITT; LIONEL "SKIP" MENO, Texas Commissioner of Education; TIMOTHY FOX; NANCY EWALD; BILL FENNELL; RAY SINECEK

Defendants - Appellees

Appeal from the United States District Court for the Western District of Texas, San Antonio

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Before SMITH, BENAVIDES and DENNIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee Lionel Meno to dismiss appeal is denied.

IT IS FURTHER ORDERED that the motion of appellee Lionel Meno to strike appellant's brief is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DWAINE GANYO, Plaintiff,	§	
V.	§	CIVIL ACTION NO. SA-93-CA-0203
SEGUIN INDEPENDENT SCHOOL DISTRICT, JAMES LEHMAN, MILTON WITT, and LIONEL (SKIP) MENO, Texas Commissioner of Education, Defendants.	§	

J U D G M E N T

The court considered the Judgment to be entered in the above styled and numbered cause.

Consistent with the Order filed in this cause on this same date,

It is hereby ORDERED, ADJUDGED and DECREED that the Memorandum and Recommendation of the United States Magistrate Judge, filed in this case on December 22, 1993, IS ACCEPTED pursuant to 28 U.S.C. § 636(b)(1) such that defendant Meno's motion to dismiss is GRANTED. IT IS FURTHER ORDERED that the Recommendation of the United States Magistrate Judge filed in this case on February 14, 1995, is ACCEPTED pursuant to 28 U.S.C. § 636(b)(1) such that defendants' motion for summary judgment is

GRANTED and plaintiff's claims against defendant Seguin Independent School District, James Lehman, Milton Witt, Timothy Fox, Nancy Ewald, Bill Fennell, and Ray Simecek be DISMISSED WITH PREJUDICE. Further, motions pending, if any, are hereby DENIED.

ORDERED, SIGNED and ENTERED this _____ day of September, 1995.

_____

FRED BIERY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DWAINE GANYO, Plaintiff,	§	
V.	§	
	§	CIVIL ACTION NO.
	§	SA-93-CA-0203
SEGUIN INDEPENDENT SCHOOL DISTRICT, JAMES LEHMAN, MILTON WITT, and LIONEL (SKIP) MENO, Texas Commissioner of Education, Defendants.	§	

O R D E R

The Court has considered the Memorandum and Recommendation of the United States Magistrate Judge, filed in the above styled and numbered cause on December 22, 1993, plaintiff's objections thereto filed on January 20, 1994, defendant Meno's response to plaintiff's objections filed February 4, 1994, and plaintiff's reply to defendant Meno's response filed March 17, 1994. The Court has also considered the Memorandum and Recommendation of the United States Magistrate Judge filed in this same cause on February 14, 1995, plaintiff's objections thereto filed March 3, 1995, and defendants' response filed March 22, 1995. Plaintiff filed an additional reply on June 7, 1995. This Court also has

before it plaintiff's Objection to Order of United States Magistrate filed April 21, 1994.

Where no party has objected to a Magistrate Judge's Memorandum and Recommendation, the Court need not conduct a de novo review of them. See 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Memorandum and Recommendation and determine whether they are either clearly erroneous or contrary to law. United States v. Wilson, 864 F.2d 1219, 1221 (5th Cir.), cert. denied, 492 U.S. 918 (1989).

On the other hand, any Memorandum or Recommendation that is objected to requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. Battle v. United States Parole Commission, 834 F.2d 419, 421 (5th Cir. 1987).

The Court has conducted a de novo review of each Memorandum and Recommendation and finds that the objections to each Recommendation are without merit. The Recommendations shall therefore be accepted pursuant to 28 U.S.C. § 636(b)(1).

Accordingly, it is hereby ORDERED that the Recommendation of the United States Magistrate Judge, filed in this case on December 22, 1993, IS ACCEPTED pursuant to 28

U.S.C. § 636 (b)(1) such that defendant Meno's motion to dismiss is GRANTED. IT IS FURTHER ORDERED that the Recommendation of the United States Magistrate Judged filed in this case on February 14, 1995, is ACCEPTED pursuant to 28 U.S.C. § 636(b)(1) such that defendants' motion for summary judgment is GRANTED and plaintiff's claims against defendant Seguin Independent School District, James Lehman, Milton Witt, Timothy Fox, Nancy Ewald, Bill Fennell, and Ray Simecek be DISMISSED WITH PREJUDICE.

In addition, the Court has reviewed plaintiff's objection to the order of the United States Magistrate Judge filed April 21, 1994, in which plaintiff's request for leave to file his fourth amended complaint was denied. This Court has reviewed the order pursuant to rule 72 of the Federal Rules of Civil Procedure and finds the magistrate judge's order to be neither clearly erroneous nor contrary to law. Accordingly, plaintiff's request for leave to file his fourth amended complaint is DENIED. Further, motions pending, if any, are HEREBY DENIED.

ORDERED, SIGNED and ENTERED this _____ day of September, 1995.

FRED BIERY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DWAINE GANYO, Plaintiff,	§	
V.	§	CIVIL ACTION NO. SA-93-CA-0203
SEGUIN INDEPENDENT SCHOOL DISTRICT, et al., Defendants.	§	

MEMORANDUM AND RECOMMENDATION

Plaintiff Dr. Dwaine Ganyo brought this action against defendants the Seguin Independent School District (SISD), its employees and trustees, and Lionel Meno, the Commissioner of the Texas Education Agency (TEA), based upon plaintiff's termination as a special education teacher. Dr. Ganyo alleges causes of action under Title 42 U.S.C. Section 1983 for violations of the First and Fourteenth Amendments and under the Rehabilitation Act, Title 29 U.S.C. Section 794, and the Individuals with Disabilities Education Act (IDEA), Title 20 U.S.C. Sections 1400-1485, and their implementing regulations. Pending before the Court is the motion for summary judgment of defendants SISD, superintendent Lehman, principal Witt, and Fox, Ewald, Fennell and Simecek, members of the Board of Trustees (docket no. 67).

Statement of Facts

According to the allegations in his second amended complaint (docket no. 34), Dr. Ganyo commenced employment with the SISD as a special education teacher in August, 1991. Throughout the fall of 1991, Dr. Ganyo was assigned as a content mastery teacher for special education students. The content mastery program consisted of learning-disabled students coming to Dr. Ganyo's classroom for individual assistance with assignments and other work in their academic subjects. Most of his students were Hispanic.

Because some of the students had failed some courses two six-weeks in a row, admission, review and dismissal (ARD) meetings were held and those students were assigned to resource classes rather than content mastery for specified courses. Despite Dr. Ganyo's objection, defendant Milton Witt, the principal, assigned the classes to Dr. Ganyo and directed him to continue to provide content mastery services during the same periods when he was responsible for teaching resource classes. When further objection to the assistant superintendent was unproductive, Dr. Ganyo prepared and released several copies of a document, dated February 18, 1992, which commented on the educational mission of the district, especially insofar as it related to learning-disabled Hispanic students and the impact of combining resource and content mastery at the same time.

Dr. Ganyo first called, then on March 9, 1992, wrote the TEA complaining of the combination of resource and content mastery at the same time. (**See** ex. A to Plaintiff's

Second Amended Original Complaint, docket no. 34). After a TEA representative called the superintendent, defendant James Lehman, and spoke to the special education director, and without further contact with Dr. Ganyo, the TEA issued its finding on March 20 that the combination of resource and content mastery was not "unreasonable or unmanageable." The TEA also indicated that due to Dr. Ganyo's failure to implement the individualized education programs (IEPs) of his students, the district was in violation of federal regulations.

As corrective action, the district asked Dr. Ganyo to sign a letter of assurance addressed to the TEA in which he was to certify that he would "provide the needed instruction to special education students assigned to me as required in their IEPs." (**See** ex. B to Plaintiff's Second Amended Original Complaint, docket no. 34). Dr. Ganyo refused to sign the letter, indicating, by circling, his objection to the word "needed." On March 28, Dr. Ganyo again complained to the TEA, which conducted no further investigation and did not alter its findings.

At a meeting between Principal Witt, Dr. Ganyo, and the assistant superintendent on March 31, Dr. Ganyo stated it was not possible to accomplish the IEPs with the assignment of the combination of mastery learning and resources students. On April 3, superintendent Lehman notified Dr. Ganyo that the administrative staff was recommending that he be terminated because he had not provided assurances that he would carry out the special education IEPs. On April 6, the district submitted to the TEA a letter stating that Dr.

Ganyo had been suspended with pay pending dismissal by the Board of Trustees and that a substitute teacher had been employed to implement the IEPs. The TEA wrote superintendent Lehman on April 16 indicating that, based upon documentation submitted by the district, the district was considered to have removed the discrepancy and to be in compliance. The Board of Trustees met April 16 and voted to terminate Dr. Ganyo. The expressed reason was his refusal to sign the TEA assurance letter.

Summary Judgment

Rule 56(b), Fed.R.Civ.P., provides that a defending party may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor. Summary judgment shall be rendered if the pleadings and evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), Fed.R.Civ.P. A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. **Celotex Corp. v. Catrett**, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The party opposing a motion must present affirmative evidence in order to defeat a properly supported motion for summary judgment. **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 257, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). An adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits otherwise, must set forth

specific facts showing that there is a genuine issue for trial; if he does not so respond, summary judgment, if appropriate, shall be entered against him. Rule 56(e), Fed.R.Civ.P.

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no **genuine** issue of **material** fact. **Anderson**, 477 U.S. at 247-248, 106 S. Ct. at 2510. The dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. **Id.** All of the evidence and inferences drawn from that evidence must be viewed in the light most favorable to the party opposing the motion for summary judgment. **Hibernia National Bank v. Carner**, 997 F.2d 94, 97 (5th Cir. 1993).

Discussion

Dr. Ganyo asserts that defendants deprived him of his property interest in employment without substantive due process in violation of the Fourteenth Amendment. He alleges that his First Amendment right to freedom of speech was violated in that he was terminated because of his complaint to the TEA and his refusal to sign the assurance letter. He also contends that his First Amendment right to freedom of association was infringed because he was terminated in part due to his association with Hispanic individuals and causes. Defendants are accused of retaliating against Dr. Ganyo for filing a complaint that the district was failing to serve its handicapped students in violation of Title 29

U.S.C. Section 794a(a)(2), and 45 C.F.R. Sections 84.61 and 80.7(e).**

I. Rehabilitation Act

Defendants contend that plaintiff lacks standing to assert a claim under the Rehabilitation Act, Title 29 U.S.C. §794.*** For the reasons expressed in the prior Memorandum and Recommendation, the Court agrees with defendants' contention. As further evidence that Dr. Ganyo is not seeking to vindicate the rights of handicapped children, reference is made to his second amended complaint (docket no. 34) in which he prays for damages from the Seguin defendants for himself, such as lost wages, retirement benefits, and for emotional distress, arising from his termination, and for reinstatement. He seeks no relief from these defendants that would benefit handicapped students in Seguin or otherwise further the interests the Rehabilitation Act was enacted to protect.

II. Freedom of Speech

Defendants assert that plaintiff's speech is not entitled to protection because it does not address a matter of public concern, his speech interest does not outweigh the school

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**Plaintiff's claims against defendant Meno are addressed in a previous Memorandum and Recommendation (docket no. 44).

***Although defendants also assert that plaintiff lacks standing under the IDEA, plaintiff is not asserting an IDEA claim against these defendants.

district's interest in efficiently carrying out its duties, and his speech was not a motivating factor in his termination. It is well-established that the First Amendment rights of public employees are limited by the nature of their public employment. **See Pickering v. Board of Education**, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968); **Blackburn v. City of Marshall**, 42 F.3d 925, ___ (5th Cir. 1995). Thus, "the state as an employer may restrict the speech of its employees in ways in which the state as sovereign may not restrict the speech of its citizens." **Scott b. Flowers**, 910 F.2d 201, 210 (5th Cir. 1990). The First Amendment rights of public employees are analyzed under the two-part test enunciated in **Pickering** and **Connick v. Myers**, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Under this analysis, an employee alleging discharge based upon his speech must first establish that his speech can be characterized as addressing a matter of public concern. **Blackburn**, 42 F.3d at ____. If plaintiff can establish the first prong, a First Amendment violation is established "only if the employee's interest in speaking outweighs 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." **Id**. (quoting **Pickering**, 391 U.S. at 568, 88 S.Ct. at 1734-35). The plaintiff must also prove that the exercise of his protected right was a substantial or motivating factor in defendants' actions. **Pierce v. Texas Department of Criminal Justice**, 37 F.3d 1146, 1149 (5th Cir. 1994).

A. Public Concern

Whether an employee's speech addresses matters of public concern and, therefore, would be entitled to protection under the First Amendment, is a question of law to be determined by the Court.[4] **Dodds v. Childers**, 933 F.2d 271, 273 (5th Cir. 1991). To make this determination, the Court looks to the "content, form, and context of a given statement, as revealed by the whole record." Id. at 273. Speech is a matter of public concern if the employee "speaks primarily as a citizen rather than as an employee" or if the speech is relevant to the evaluation of the government agency's performance. Id. The existence of an element of personal interest on the part of an employee in the speech does not preclude a finding that the speech as a whole raises a matter of public concern. Id.

The speech referenced here by plaintiff consists of his complaints to the TEA and his refusal to sign the school district's letter of assurance to the TEA.[5] A review of plaintiff's letter to the TEA indicates that plaintiff complained that he was unable to carry out the IEPs of the students. Plaintiff further questioned whether the school

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[4]It has been noted, however, that "subsidiary fact issues may require resolution by a jury." Noyola v. Texas Department of Human Resources, 846 F.2d 1021, 1024 (5th Cir. 1988).

[5]Plaintiff characterizes the school district's requirement that he sign the letter of assurance as "coerced expression."

district's work assignment would have been the same if non-Hispanic students at the other end of the educational spectrum had been involved. Thus, plaintiff's speech addressed the education of children with learning disabilities and raised the possibility that the school district was discriminating against Hispanic children. Therefore, the content of the speech was addressed to matters of public concern. Plaintiff's letter was addressed to the state agency responsible for oversight of the IDEA and the implementation of IEPs. Therefore, the form and context of the letter also support a finding that the speech addressed a matter of public concern.

Defendants, however, characterize plaintiff's speech as a mere dispute over a teaching assignment. It is true that complaints about working conditions are personal grievances not entitled to First Amendment protection. **Dodds**, 933 F.2d at 274. It has also been held, however, that the existence of mixed motives in speech does not remove protection of that speech if the speech also addresses matters of public concern. **Davis v. Ector County**, 40 F.3d 777, 783 (5th Cir. 1994). While a speaker's motivation may be considered when determining whether speech addresses matters of public concern, it is not a determinative factor. **Id**. at 782. As noted above, the form, content and context of the speech are the determinative considerations. **Id**. Plaintiff's speech addressed matters of public concern and, even though he had a private interest as well in reducing his workload, that speech is entitled to First Amendment protection.

B. Balance of Interests

Although plaintiff's speech addressed matters of public concern, plaintiff's interests in that speech must still be balanced against the school district's interest in efficiently carrying out its duties. This balancing of interests is a question of law for the Court to determine. **United States Department of Justice v. Federal Labor Relations Authority**, 955 F.2d 998, 1006 (5th Cir. 1992). In determining this balance, the time, place and manner of the speech, as well as the context in which the dispute arose, are considered. **Rankin v. McPherson**, 483 U.S. 378, 388, 107 S.Ct. 2891, 2899, 97 L.Ed.2d 315 (1987). Factors to be considered include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." **Id**.

Plaintiff asserts that the government has no interest in violating the law; however, plaintiff has failed to establish any violation of the law. Although it was plaintiff's **opinion** that the law was being violated by not carrying out the IEPs, and it was his **speculation** that the work assignment was based upon a discriminatory motive, he offered no evidence that the dual teaching assignment was unworkable. The TEA found no violations and noted that the arrangement, as described by plaintiff, did "not appear to be unreasonable or unmanageable." (Docket no. 67), Witt affidavit, exh. B, attachment 2).

Instead, the TEA found that plaintiff was not implementing the IEPs which, in turn, placed the school district in violation of Title 34 C.F.R. §300.342. (Id., attachments 1 and 2). The TEA then gave SISD two weeks in which to provide documentation showing **immediate** action to implement the IEPs. (Id., attachment 1).

Whether the TEA's finding that plaintiff was not carrying out the IEPs of his students was correct, is not determinative of whether the school district's course of action was correct.[6] Regardless of whether the TEA's finding was correct, SISD was placed in a position which required immediate action. Because the TEA found that plaintiff was not implementing the IEPs, it was not unreasonable for the school district to look to plaintiff for correction of the problem. The question presented here is who decides the most effective manner for utilization of resources so as to correct the perceived noncompliance.

Plaintiff's position requires a finding that a teacher can determine what is the appropriate workload for his own teaching assignment. Evidence submitted by plaintiff indicates that plaintiff's workload was, in fact, less than that of other resource and content mastery teachers within the same district. (Docket no. 73, local hearing exhibit A-2; id., Cano deposition exh. 1). Plaintiff's workload was lightened by the

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[6]Plaintiff acknowledges, however, that he worked primarily with the resource students and left the content mastery students to his aide. (Docket no. 73, statement of facts at 11-12).

presence of an aide, a benefit the other teachers did not have. (Id., Cano depo., exh. 1). Plaintiff may have had a genuine belief that his students' needs were not being met because of his dual work assignment. He was, however, never directed to cease speaking out on this matter and, indeed, the TEA provided plaintiff with the opportunity to submit additional information. (See id. attachment 2).

All parties acknowledge that the direct reason for plaintiff's termination was his refusal to provide an assurance to the TEA that he would implement the students' IEPs.[7] This does not present a situation, such as in **Rankin**, where the speech is unrelated to the employee's work and does not interfere with the functioning of the office. In **Rankin**, the plaintiff was employed in a clerical position within the office of a county constable. 483 U.S. at 380, 107 S.Ct. at 2894-95. Upon hearing of an attempted assassination of then President Reagan, plaintiff stated to a co-worker that she hoped "they get him" next time. **Id**. at 381, 107 S.Ct. at 2895. The Court found that because plaintiff's duties did not involve any law-enforcement or policy-making functions, it did not affect the efficient functioning of the government agency. **Id**. at 390-392, 107 S.Ct. at 2900-2901. The Court, therefore, found the state's interest to be minimal and overbalanced by plaintiff's First Amended interests.

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[7]The Court will assume at this point that the refusal to sign the assurance was actually speech.

Here, plaintiff's refusal to provide any assurance that the IEP's would be carried out directly affected both his specific duties and the school district's mission in educating its students. (Docket no. 67, Arnold affidavit, exh. A; Witt affidavit, exh. B; and Lehman affidavit, exh. C). Indeed, the school district was threatened with losing its accreditation from the state. This case is more analogous to **McAdams v. Matagorda County Appraisal District**, 798 F.2d 842 (5th Cir. 1986). In **McAdams**, plaintiff asserted that he had been terminated for refusing to carry out illegal acts.[8] 798 F.2d at 846. The Fifth Circuit found, however, that McAdams had been terminated not for his criticism of the Board, but rather for his refusal to "cooperate with or follow the biddings of his employers . . ." **Id**. As the district court found, "[p]laintiff was fired for demanding the freedom to do his job the way he felt it ought to be done." **Id**. at 845.

Plaintiff here is protesting his work assignment and refusing to comply with his employer's directives to correct his violation cited by the TEA. Although plaintiff's speech addressed a matter of public concern,[9] the

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[8]In McAdams, as here, there was insufficient evidence to establish any illegal acts by defendants. 798 F.2d at 845.

[9]It should be noted that the matters raised by plaintiff's speech involved rights which belonged to his students and, as noted above, could be asserted by those students themselves. When plaintiff's free speech rights are balanced against the interests of

context in which he made his expression (refusing to sign an assurance to the TEA) had a direct and substantial impact on the ability of the school district to carry out its educational mission. If every teacher were allowed to determine whether his work assignment were appropriate, and then refuse to carry out that assignment when he determined in his opinion that the assignment was excessive or otherwise inappropriate, the ability of a school district to effectively carry its educational mission would be divested. Plaintiff was free to continue to speak out regarding the appropriateness of his assignment; he was not free to disregard his employer's directives so as to do what he perceived to be his job in the manner in which he felt it ought to be done.

Plaintiff attempts to distinguish between a refusal to sign the assurance and a refusal to follow the directive to satisfy his teaching assignment. He admits that: "Had the district addressed Dr. Ganyo's conduct by directing the use of any particular methodology, his refusal to comply with such a directive would concededly have furnished legal grounds for his termination." (Docket no. 73, p. 8). The distinction is illusory. Plaintiff ignores the TEA mandate that the SISD provide "documentation" and take "immediate" action to assure the IEPs were being followed. (Docket No. 67, Lehman

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the school district, the issues presented spill over towards plaintiff's own interests in his work load and carrying out his own educational beliefs. As such, plaintiff's interests carry considerably less weight.

affidavit, exh. C, attachment 1). The assurance plaintiff refused to sign was intended to serve that purpose. Plaintiff's speech interests, including his "refusal to speak", are outweighed by the school district's interests in efficient education. Therefore, summary judgment should be granted as to plaintiff's free speech claims.

C. Causation

The summary judgment evidence, discussed below in Section IV, establishes that plaintiff's TEA complaint was not a motivating factor in his termination. His refusal to sign the assurance was undeniably the cause for his discharge; however, his interest in that speech, if it is speech, is outweighed by the interests of the SISD.

III. Freedom of Association

Defendants next assert that summary judgment should be granted on plaintiff's freedom of association claim because there is no evidence that plaintiff's association with Hispanic board members or his marriage to a Hispanic woman played a substantial or motivating role in his termination. Unlike a freedom of speech claim, a public employee's freedom of association claim is not subject to any public concern requirement. **Coughlin v. Lee**, 946 F.2d 1152, 1158 (5th Cir. 1991). Nevertheless, the court must weigh the interests of the parties in the same manner as a freedom of speech claim. **Id**. Plaintiff must also show that his association was a substantial or motivating factor in his termination. **See id**. (applying analysis in **Mt. Health City School District Coard of Education**

v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977) to a freedom of association claim).

The sole evidence submitted by plaintiff on his freedom of association claim is the testimony of the TEA investigator, Claudia Knowles that defendant Cano had stated to her: (1) he wanted to remove plaintiff; and (2) plaintiff had gone to Hispanic board members trying to get rid of the superintendent. (Docket no. 73, TEA hearing at 511-14). The principal problem with this evidence is that it involves two separate statements; there is no evidence that plaintiff was terminated **because** he went to the Hispanic school board members. Plaintiff asks the Court to make the unsupported leap from the fact that Cano knew he spoke to the Hispanic board members and desired to get rid of him, to a conclusion that he necessarily wanted to fire him because he went to the Hispanic board members.

The well-established standard for summary judgment is "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, . . . or is not significantly probative, . . . summary judgment may be granted." **Anderson**, 477 U.S. at 249-50, 106 S.Ct. at 2511 (citations omitted). Plaintiff's "evidence" would require speculation for a jury to reach the conclusion that his association was a substantial or motivating factor in his termination. Therefore, it must be concluded that plaintiff's evidence is insufficient (or not sufficiently probative) to present an issue for the jury. Additionally, as

explained in section IV below, the probative summary judgment evidence establishes that plaintiff's association with Hispanics was not a consideration in his termination. Also, as detailed **supra** in section II, his interests are outweighed by the school district's interest in efficient education. Accordingly, summary judgment is appropriate as to plaintiff's freedom of association claim.

IV. Substantive Due Process

Plaintiff asserts that he was deprived of his property interest in employment[10] without good cause in violation of the requirements of substantive due process. To establish a substantive due process claim, plaintiff must show that the government's action was arbitrary or not reasonably related to a legitimate government interest. **Williams v. Texas Tech University Health Sciences Center**, 6 F.3d 290, 294 (5th Cir. 1993). In his response to defendants' motion for summary judgment, plaintiff's sole assertion is that terminating his employment because he refused to sign the letter of assurance is arbitrary and capricious because that reason is clearly impermissible under federal law. As noted above, however, plaintiff has failed to establish an illegal action on the part of defendants. Assuming that plaintiff is asserting his termination was arbitrary and capricious because it arose from a denial of his freedom of speech, plaintiff's claim fails for the reasons stated above, **i.e.**, the

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[10]Defendants have not contested that plaintiff had a property interest in his employment.

state's interest in promoting efficient education overbalances plaintiff's speech interests and, therefore, the action taken was not illegal.

Further, the evidence submitted to the Court indicates that the decision to terminate plaintiff was not arbitrary, but instead was based upon substantial evidence. Prior to his termination, plaintiff was afforded an evidentiary hearing before the school board. There was evidence presented at that hearing that the dual teaching assignment was a common arrangement. (Docket no. 73, local hearing at 53 and exh. 2). There was also testimony that the school district attempted to persuade plaintiff to comply with the administrative directives regarding his assignment and to provide the assurance to the TEA, but plaintiff did not work with the content mastery students as directed or sign any assurance. (**Id.** at 45, 129-30). The affidavits submitted by board members Fox, Ewald, Fennell, and Simecek indicate that the decision to terminate plaintiff's employment was based upon a finding of his refusal to follow administrative directives and insubordination, and was not based upon his complaints or association. (Docket No. 67, exhs. D-G). Plaintiff has submitted no evidence that the school board members who voted for his termination were otherwise motivated. Therefore, it must be concluded that the decision to terminate plaintiff was not arbitrary. Accordingly, summary judgment

should be granted as to plaintiff's substantive due process claim.[11]

RECOMMENDATION

It is the recommendation of the Magistrate Judge that defendants' motion for summary judgment (docket no. 67) be **GRANTED** and that plaintiff's claims against defendants Sequin Independent School District, Lehman, Witt, Fox, Ewald, Fennell and Simecek be **DISMISSED WITH PREJUDICE.**

Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties by mailing a copy to each of them by Certified Mail, Return Receipt Requested. Pursuant to Title 28, U.S.C. Section 636(b)(1), any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the District Court. A party filing objections must specifically identify

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[11]Because all of plaintiff's claims fail on the merits, defendants' other assertions regarding policy or custom and qualified immunity need not be reached. Also, assuming plaintiff has standing to assert a Rehabilitation Act claim, the summary judgment evidence establishes, as a matter of law, that he was not terminated in retaliation for his complaint to the TEA.

those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the District Court need not consider frivolous, conclusive or general objections. **Such party shall file the objections with the clerk of the court, and serve the objections on the Magistrate Judge and on all other parties**. A party's failure to file such objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a de novo determination by the District Court. Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. 1982). **See Thomas v. Arn**, 474 U.S. 140, 150, 106 S.Ct. 466, 472, 88 L.Ed.2d 435 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court, except upon grounds of plain error or manifest injustice. **Nettles**, 677 F.2d at 410.

SIGNED this _____ day of February, 1995.

JOHN W. PRIMOMO
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DWAINE GANYO, Plaintiff,	§	
V.	§	CIVIL ACTION NO. SA-93-CA-0203
SEGUIN INDEPENDENT SCHOOL DISTRICT, JAMES LEHMAN, MILTON WITT, and LIONEL (SKIP) MENO, Texas Commissioner of Education, Defendants.	§	

MEMORANDUM AND RECOMMENDATION

Plaintiff Dr. Dwaine Ganyo brought this action against defendants the Seguin Independent School District, its employees and trustees, and Lionel Meno, the Commissioner of the Texas Education Agency (TEA), based upon plaintiff's termination as a special education teacher. Dr. Ganyo alleges causes of action under Title 42 U.S.C. Section 1983 for violations of the First and Fourteenth Amendments and under regulations implemented pursuant to the Rehabilitation Act, Title 29 U.S.C. Section 794, and the Individuals with Disabilities Education Act (IDEA), Title 20

U.S.C. Sections 1400-1485.[12] Meno has filed a motion to dismiss alleging that Dr. Ganyo's claims against him are barred by the Eleventh Amendment and the doctrine of qualified immunity, and fail to state a claim upon which relief can be granted. (Docket no. 4).

Statement of Facts

According to the allegations in his second amended complaint (docket no. 34), Dr. Ganyo commenced employment with the Seguin Independent School District as a special education teacher in August, 1991. Throughout the fall of 1991, Dr. Ganyo was assigned as a content mastery teacher for special education students. The content mastery program consisted of learning-disabled students coming to Dr. Ganyo's classroom for individual assistance with assignments and other work in their academic subjects. Most of his students were Hispanic.

Because some of the students had failed some courses two six-weeks in a row, admission, review and dismissal (ARD) meetings were held and those students were assigned to resource classes rather than content mastery for specified courses. Despite Dr. Ganyo's objection, defendant Milton Witt, the principal, assigned the classes to Dr. Ganyo and directed him to continue to provide content mastery services during the same periods when he was responsible for teaching

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[12]The IDEA was formerly known as the Education of All Handicapped Children Act (EAHCA) and the Education of the Handicapped Act (EHA).

resource classes. When further objection to the assistant superintendent was unproductive, Dr. Ganyo prepared and released several copies of a document, dated February 18, 1992, which commented on the educational mission of the district, especially insofar as it related to learning-disabled Hispanic students and the impact of combining resource and content mastery at the same time.

Dr. Ganyo first called, then on March 9, 1992, wrote the TEA complaining of the combination of resource and content mastery at the same time. (See ex. A to Plaintiff's Second Amended Original Complaint, docket no. 34). After a TEA representative called the superintendent, defendant James Lehman, and spoke to the special education director, and without further contact with Dr. Ganyo, the TEA issued its finding on March 20 that the combination of resource and content mastery was not "unreasonable or unmanageable." The TEA also indicated that due to Dr. Ganyo's failure to implement the individualized education programs (IEPs) of his students, the district was in violation of federal regulations.

As corrective action, the district asked Dr. Ganyo to sign a letter of assurance addressed to the TEA in which he was to certify that he would "provide the needed instruction to special education students assigned to me as required in their IEPs." (See ex. B to Plaintiff's Second Amended Original Complaint, docket no. 34). Dr. Ganyo refused to sign the letter, indicating, by circling, his objection to the word "needed." On March 28, Dr. Ganyo again complained to the

TEA, which conducted no further investigation and did not alter its findings.

At a meeting between Principal Witt, Dr. Ganyo, and the assistant superintendent on march 31, Dr. Ganyo stated it was not possible to accomplish the IEPs with the assignment of the combination of mastery learning and resources students. On April 3, superintendent Lehman notified Dr. Ganyo that the administrative staff was recommending that he be terminated because he had not provided assurances that he would carry out the special education IEPs. On April 6, the district submitted to the TEA a letter stating that Dr. Ganyo had been suspended with pay pending dismissal by the Board of Trustees and that a substitute teacher had been employed to implement the IEPs. The TEA wrote superintendent Lehman on April 16 indicating that, based upon documentation submitted by the district, the district was considered to have removed the discrepancy and to be in compliance. The Board of Trustees met April 16 and voted to terminate Dr. Ganyo. The expressed reason was his refusal to sign the TEA assurance letter.

Analysis

Dr. Ganyo asserts that defendants deprived him of his property interest in employment without substantive due process in violation of the Fourteenth Amendment. He alleges that his First Amendment right to freedom of speech was violated in that he was terminated because of his complaint to the TEA and his refusal to sign the assurance letter, and his publication of materials regarding discrimination. He also contends that his

First Amendment right to freedom of association was infringed because he was terminated in part due to his association with Hispanic individuals and causes. Defendants are accused of retaliating against Dr. Ganyo for filing a complaint that the district was failing to serve its handicapped students in violation of Title 29 U.S.C. Section 794a(2) and 45 C.F.R. Sections 84.61 and 80.7(e). Finally, Meno is charged with failing to adopt and implement an adequate procedure for the investigation of complaints as required by Title 34 C.F.R. Section 76.780, regarding alleged violations by entities receiving federal financial assistance for education.

1. Eleventh Amendment and Qualified Immunity

In his motion to dismiss, Meno points out that Dr. Ganyo does not specify whether Meno is being sued in this individual or official capacity or both. Assuming the last, Meno contends that a suit against him in his official capacity is, in effect, a suit against the State of Texas and is barred by the Eleventh Amendment. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 101, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984). As for a claim against him in his individual capacity, Meno argues that Dr. Ganyo has failed to allege specific facts sufficient to overcome his qualified immunity defense. See Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); Elliot v. Perez, 751 F.2d 1472, 1482 (5th Cir. 1985). These arguments need not be addressed, however, in light of Dr. Ganyo's response to Meno's motion.

Dr. Ganyo responds that he is suing Meno for prospective injunctive relief only, not damages; therefore, the Eleventh Amendment and qualified immunity defenses do not apply. Since Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Supreme Court has recognized the exception that a party may sue to have a federal court order state officials to conform their conduct to the requirements of federal law. Self-Insurance Institute of America, Inc. v. Korioth, 993 F.2d 479, 482 (5th Cir. 1993). Mangaroo v. Nelson, 864 F.2d 1202, 1208 (5th Cir. 1989). Thus, suits for prospective injunctive relief against state officials are not bared. Word of Faith World Outreach Center Church, Inc. v. Morales, 986 F.2d 962, 965 (5th Cir.), cert. denied, ____ U.S. ____, 114 S.Ct. 82, ____ L.Ed.2d ____ (1993). Ex parte Young is premised on the fiction that acts by state officials which are contrary to federal law cannot have been authorized by the state; therefore, suits seeking to enjoin such wrongful and unauthorized acts are not suits against the state for purposes of Eleventh Amendment immunity. Saltz v. Tennessee Department of Employment Security, 976 F.2d 966, 968 (5th Cir. 1992). The essential ingredients of the Ex parte Young doctrine are that a suit must be brought against individual persons in the official capacities as agents of the state and the relief sought must be declaratory or injunctive in nature and prospective in effect. Id.

In the prayer for relief in his second amended complaint, Dr. Ganyo requests the issuance of an injunction against Meno compelling an adequate investigation of complaints filed by teachers that a local

school district is violating a provision of federal law or regulation.[13] Dr. Ganyo has sought leave to file a third amended complaint which would add the additional request that Meno be restrained from assisting a local school district in retaliating against an employee who files a complaint with the TEA. Clearly, Dr. Ganyo has brought his claim against Meno precisely within the Ex parte Young doctrine. The fact that he also seeks attorneys' fees and costs does not vitiate the exception. Hutto v. Finney, 437 U.S. 678, 692, 98 S.Ct. 2565, 2574, 57 L.Ed.2d 522 (1978). Thus, the Eleventh Amendment does not bar Dr. Ganyo's suit against Meno for prospective injunctive relief. Additionally, qualified immunity has no relevance in this context. Mangaroo v. Nelson, 864 F.2d at 1208.

2. Existence of a Claim Upon Which Relief Can Be Granted

Dr. Ganyo's allegations against Meno are directed toward the adequacy of the complaint procedure and the alleged retaliation suffered by Dr. Ganyo as a consequence of filing of a complaint. The first claim implicates the IDEA and Title 34 C.F.R. Sections 76.780 and 76.781; the latter claim is grounded upon the

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[13]Although Dr. Ganyo indicates that such procedures should eliminate the deficiencies set forth in paragraph 27, the Court assumes he intended to refer to paragraph 31 which includes the specific defects alleged to exist in the complaint procedure. Those defects had been alleged in paragraph 27 of the first amended complaint. (Docket no. 2).

Rehabilitation Act and its relevant regulations, Title 45 C.F.R. Sections 84.61 and 80.7(e). In his second amended complaint, Dr. Ganyo cites as specific procedural deficiencies by the TEA:

(1) The failure to protect complainants from retaliation by local school districts,[14]

(2) The failure to require a TEA investigator to contact a complainant regarding disputed matters,

(3) The failure to require adequate investigations of complaints that instructional arrangements (such as the combination of resource and content mastery) prevent teachers from complying with IEPs,

(4) The failure to require that the district take corrective action as opposed to merely making an assurance, and

(5) The failure to ensure that handicapped students are not subjected to adverse instructional arrangements to which non-handicapped students are not subjected.

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[14]In his proposed third amended complaint, Dr. Ganyo adds the allegation that TEA procedures fail to prevent Meno's agents from assisting in this retaliation.

Meno agues that Section 76.780 does not create a cause of action. He also asserts that Sections 76.780 and 76.781 do not require the TEA to enact procedures to protect complainants from retaliation or to require that complainants be contacted during an investigation. He contends that the regulations do not specify what measures must be taken during an investigation. Finally, Meno states the Secretary of Education, not he, has the jurisdiction and authority under the Rehabilitation Act to provide ultimate disposition of complaints.

Before resolving the issue of the alleged failure to state a claim, it is necessary to briefly describe the applicable statutes. The IDEA is a comprehensive statute enacted to ensure that all children with disabilities have access to a free appropriate public education designed to meet their unique needs. Association for Community Living v. Romer, 992 F.2d 1040, 1043 (10th Cir. 1993); Hoeft v. Tucson Unified School District, 967 F.2d 1298, 1300 (9th Cir. 1992). The primary mechanism for implementing this goal is an IEP. Id. To protect each child's right to a free appropriate public education, states receiving federal funds under the IDEA must establish procedures to ensure that parents have meaningful involvement in decisions concerning their children's educational programming and an opportunity to seek review of decisions they think are inappropriate. Id. In addition to the IDEA's procedural safeguards, the Education Division General Administrative Regulations (EDGAR), Title 34 C.F.R. Section 76.1-.910, require states to adopt a formal complaint procedure to ensure state and local compliance with federally funded education

programs, including the IDEA. Id. Sections 76.780 and 76.781 are part of EDGAR.

The Rehabilitation Act, Title 29 U.S.C. Section 794, prohibits discrimination against an individual by reason of a handicap, in any program or activity receiving federal financial assistance. Retaliation against persons who complain of handicap discrimination is also actionable. Title 45 C.F.R. Sections 84.61 and 80.7(e). See Hoyt v. St. Mary's Rehabilitation Center, 711 F.2d 864, 867 (8th Cir. 1983); Ross v. Allen, 515 F.Supp. 972, 976 (S.D.N.Y. 1981). Despite the specific application of the IDEA to discrimination against the handicapped in education, the remedies under the Rehabilitation Act are also available. See Title 20 U.S.C. Section 1415(f).

Meno does not contend that a cause of action for retaliation does not exist. He does argue that there is no cause of action under Sections 76.780 and 76.781 to enforce complaint procedures. Section 76.780 requires a state to adopt a written complaint resolution procedure (CRP) for receiving and resolving complaints that the state or a local agency is violating the IDEA or its regulations. In Mrs. W. v. Tirozzi, 832 F.2d 748 (2d Cir. 1987), the plaintiffs sued the Connecticut Commissioner of Education alleging that the failure to make bona fide attempts to resolve their complaints violated the EHA, and the due process and equal protection clauses of the Fourteenth Amendment. One of plaintiffs' specific complaints, similar to one raised by Dr. Ganyo, was that the State Board of Education failed to comply with CRP requirements because it neither established

communication with plaintiffs during its investigation, nor provided them with an opportunity to present relevant information. 832 F.2d at 752. Plaintiffs requested issuance of an injunction requiring the formulation and implementation of adequate complaint resolution procedures. Id. at 753.

The District Court dismissed plaintiffs' complaint. On appeal, the Second Circuit Court of Appeals reversed, holding that parents are entitled to bring a Section 1983 action based on alleged violations of the EHA or the federal constitution. 832 F.2d at 755. The case was remanded to determine whether the State Board of Education had complied with the EHA, its implementing regulations, and particularly with CRP requirements. Id. at 758. Thus, a cause of action can be stated for alleged violations of the complaint resolution procedure required by Section 76.780.

3. Standing

Despite the fact that causes of action exist, Dr. Ganyo can proceed against Meno only if he has standing to prosecute those claims. Thomas v. N.A. Chase Manhattan Bank, 994 F.2d 236, 242 (5th Cir. 1993). Standing is a prerequisite to the exercise of Article III power. Id. Standing consists of three elements: (1) injury in fact--invasion of a legally-protected interest, (2) a causal connection between the injury and conduct complained of, and (3) the injury can be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. ___, ___, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). The

party invoking federal jurisdiction bears the burden of establishing these elements. Id.

Dr. Ganyo's allegations seem to satisfy these requirements. However, beyond the constitutional prerequisites, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. The principle relevant here is that a plaintiff generally must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474, 102 S. Ct. 752, 760, 70 L.Ed.2d 700 (1982); Thomas, 994 F.2d at 242. The plaintiff's complaint must fall within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question. Valley Forge, 454 U.S. at 475, 102 S.Ct. at 760; Apache Bend Apartments, Ltd. v. United States, 987 F.2d 1174, 1176 (5th Cir. 1993). The only people who may sue to enforce a law are the intended beneficiaries of the statute, i.e., the class of people it was designed to protect. Sabine River Authority v. U.S. Department of Interior, 951 F.2d 669, 675 (5th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 75, 121 L.Ed. 2d 40 (1992).

Dr. Ganyo is not a member of the class of people either the IDEA or the Rehabilitation Act was designed to protect. The IDEA, by its terms, is intended "to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education . . ." (emphasis added). Title 20 U.S.C. Section 1415(a). There is no authority

that the IDEA is intended to benefit teachers or provide them with employment protection.

In certain situations, one person can assert the rights of another. See Singleton v. Wulff, 428 U.S. 106, 113-116, 96 S.Ct. 2868, 2874-75, 49 L.Ed.2d 826 (1976). However, such a circumstance does not exist here. Arguably, the relationship between Dr. Ganyo and his special education students and the rights he seeks to protect is such that he would be an effective proponent of these rights. However, there is no basis to believe that the students and their parents cannot as effectively protect their own rights if they felt they were being violated. There is no obstacle to their prosecution of a lawsuit concerning the complaint procedure. Thus, this case is not one where Dr. Ganyo has standing to advance the interests of Seguin students and their parents.

Courts have held that a teacher does not have standing to assert the rights of his students. See e.g., Moody v. Jefferson Parish School Board, 803 F.Supp. 1158, 1163-64 (E.D. La. 1992), aff'd, 2 F.3d 604 (5th Cir. 1993). Castro v. New York City Board of Education, 787 F.Supp. 26, 30 (D.P.R.), aff'd, 972 F.2d 337 (1st Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 306, 121 L.Ed.2d 229 (1992). Specifically in the context of the IDEA, courts have found no standing by local education authorities, by whom teachers are employed. Andrews v. Ledbetter, 880 F.2d 1287, 1289-90 (11th Cir. 1989); Board of Education of the Seneca Falls Central School District v. Board of Education of the Liverpool Central School District, 728 F.Supp. 910, 913-14 (W.D.N.Y. 1990). In Hannigan v.

Fuget, No. 93-2035, 1993 WL 257416 (E.D. Pa. July 12, 1993), an unpublished opinion, the District Court dealt with the precise issue here concerning teacher standing and found that a teacher is not within the zone of interest the IDEA protects. Clearly, the students and their parents and guardians are the intended beneficiaries of the statute, and only they can invoke its protections. For these reasons, Dr. Ganyo lacks standing to present a claim pursuant to the IDEA or its accompanying regulations.

An analysis of the Rehabilitation Act claim results in a similar conclusion. The Rehabilitation Act and its regulations were enacted to protect the handicapped; Dr. Ganyo is not handicapped. One district court has held that a school psychologist, who was allegedly terminated because of her complaint regarding the suspension of a student, was within the zone of interest protected by the anti-retaliation provisions of the Rehabilitation Act and, thus, had standing to sue. Ross, 515 F.Supp. at 976. For several reasons, this Court believes the Ross standing decision was incorrect.

The Ross court fails to provide any explanation, with due regard to the relevant law on standing, for its conclusion that the school psychologist was within the zone of interest protected by the Rehabilitation Act. The court assumed that plaintiff's theory was that the behavioral problems which led to the suspension of the student were linked to her handicap; thus, the psychologist's complaint came under the anti-retaliation provision. This conclusion assumes that the complaint procedure and the anti-retaliation provision

were intended to benefit someone other than the handicapped person who complained of discrimination. The Ross court cited no authority for this belief. Nor did that court explain why the student was unable to protect her own rights by a complaint and then, if necessary, utilize the anti-retaliation protection.

There is simply no authority that the Rehabilitation Act or the anti-retaliation provision was meant to protect anyone other than the handicapped person. The rationale for denying standing to a teacher under the IDEA applies equally to the Rehabilitation Act claim. See Andrews, 880 F.2d at 1290-91 (despite the "commendable concern" of local education authorities that handicapped children receive a free, appropriate public education, Congress did not grant them the right to bring an action to ensure that the IDEA's mandates are carried out); Seneca Falls, 728 F.Supp. at 913-914 (same); Hannigan, at *1 fn.3 (there is no authority for the teacher's argument that standing arises from an indirect connection between an alleged violation of the student's IDEA rights and plaintiff's injury). Even if one considers third-party standing, Dr. Ganyo's claim must fail. He has filed three complaints and seeks to file a fourth. In all of them, he is complaining of actions taken against him, not against his handicapped or disabled students. Never does he allege any harm to any student caused by the combination of resource and content mastery classes. In fact, he admits the classes were combined because of the failures of his students. Clearly, Dr. Ganyo seeks to vindicate his own rights and lacks

standing to assert those of his students. See Moody, 803 F.Supp. at 1164.

4. Merits

Assuming for purposes of this discussion that standing does exist, Dr. Ganyo's claims against Meno should still be dismissed. As previously noted, Sections 76.780 and 76.781 require states to establish complaint procedures for IDEA claims with certain minimum requirements. Texas has complied. Title 19 Texas Administrative Code Sections 113.21 and 113.22 provide for complaints that federally funded education programs are violating a constitutional or statutory provision. Those sections include, as required, an on-site investigation, if necessary, a 60-day time limit for resolution, and a review procedure. Dr. Ganyo complains that the Section 76.781 minimum procedures are not adequate and that further procedures are necessary. He gives no constitutional or statutory authority for additional requirements. It is up to Congress or the federal education agency, not the courts, to change these rules. As for Dr. Ganyo's assertion that Meno should enact rules to prevent retaliation for filing an IDEA complaint, even the Ross court rejected such a claim. 515 F.Supp. at 976-77.

He complains that, in this case, Meno failed to contact him. However, it was Dr. Ganyo's unsolicited complaint that started this affair. First he called, then wrote a letter in which he stated he was unable to carry out the IEPs because he was assigned to teach resource and content mastery at the same time. Dr. Ganyo does not assert that he was

prevented from again volunteering relevant information.[15] Nor does he indicate what additional information he would have provided had he been given the opportunity. Besides the communications from Dr. Ganyo, the TEA's investigation included at least one conversation with the school district. Again, Dr. Ganyo does not specify what further investigation should have been done. The TEA sought an assurance from the district, who sought one from Dr. Ganyo, that needed instruction would be provided. Dr. Ganyo refused. His complaint fails to state a claim that the IDEA complaint procedures are inadequate or were not followed.[16]

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[15]In fact, Dr. Ganyo did complain again to the TEA after he refused to sign the letter of assurance.

[16]On remand in Mrs. W. v. Tirozzi, 706 F.Supp. 164 (D. Conn. 1989), the District Court denied defendant's motion for judgment on the pleadings. However, in that case, there was no state complaint resolution procedure. 706 F.Supp. at 165 n.1 and 166. Here, there is. The District Court also believed that plaintiff's complaint stated a cause of action for the State Board's alleged failure "to respond to complaints meaningfully and directly and . . . to make bona fide attempts to resolve the complaints." Id. at 169. Dr. Ganyo's complaint in this court is not so sufficient. He has alleged only "dissatisfaction with the outcome . . ." which is not sufficient. Id. Additionally, to the extend the Tirozzi district court was imposing requirements not found in either the IDEA or the regulations, the decision finding that a

The Rehabilitation Act claim, based upon the anti-retaliation provision, suffers from an absence of facts. Dr. Ganyo acknowledges that the stated reason for his discharge was the refusal to sign the assurance. He alleges no facts which suggest that Meno played a role in his termination or even had such authority. According to Dr. Ganyo, the connection with Meno derives from the TEA findings rejecting Dr. Ganyo's complaint which "assisted the administrators of the district considerably in their quest to terminate plaintiff." (See Plaintiff's Response to Defendant Meno's Motion to Dismiss, pp. 5-6, docket no. 6). Even if this allegation is true, it falls far short of asserting knowledge and participation by Meno in the decision to discharge Dr. Ganyo. He does not even allege, other than by unsupported implication, that Meno retaliated against him for filing his complaint. The anti-retaliation claims also fails for failure to state a claim.

Meno has asked, alternatively, for a more definite statement. The Court will normally permit a plaintiff the opportunity to replead to cure any pleading deficiencies. Here, however, Dr. Ganyo has already filed three complaints, one of which succeeded Meno's motion. His fourth complaint, which he says is to assert more specific allegations against Meno, does nothing to cure the defects discussed above. No purpose would be served by allowing Dr. Ganyo to further amend his complaint.

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claim had been stated cannot be supported.

RECOMMENDATION

It is the recommendation of the Magistrate Judge that Meno's motion to dismiss be granted.

Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties by mailing a copy to each of them by Certified Mail, Return Receipt Requested. Pursuant to Title 28, U.S.C. Section 636(b)(1), any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the District Court. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the District Court need not consider frivolous, conclusive or general objections. **Such party shall file the objections with the clerk of the court, and serve the objections on the Magistrate Judge and on all other parties**. A party's failure to file such objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a **de novo** determination by the District Court. Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. 1982). See Thomas v. Arn, 474 U.S. 140, 150, 106 S.Ct. 466, 472, 88 L.Ed.2d 435 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation contained in this Memorandum and Recommendation within 10

days after being served with a copy shall bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court, except upon grounds of plain error or manifest injustice. Nettles, 677 F.2d at 410.

SIGNED this _____ day of December, 1993.

_____
JOHN W. PRIMOMO
United States Magistrate Judge

March 9, 1992

Carmen Colorado
Division of Complaints
TEA 1701 No. Congress
Austin, Texas 78701

Dear Carmen:

Yes, I am complaining. I am unable to carry out the IEP's for my LD students at Saegert Junior High in Seguin.

The reason for my inability is that (starting this second semester) for three periods each day I am responsible for two teaching assignments at the same time (content mastery and resource).

Fourth six weeks' results: about 60% of my students have lower grades than they did for the third six weeks - with 19% more F's - with a six point drop per subject. (We are supposed to be going upward, not downward.)

A six point drop for my students is disastrous.

This is already the eighth week of eighteen. Unless this is corrected soon, I fear that many of my students will, through no failure of their own, be retained.

Would this have been implemented at the other end of the "exceptional child" continuum - math and algebra - with 75% or higher Anglo

enrollment? If no, why is it acceptable here where the enrollment is maybe 75% Hispanic?

Help!

Warm regards,
Dwaine Ganyo

To: R. Hausman, D. Ganyo
From: Milton Witt
Subject: Resource Classes, 2nd Semester 1991-92
Date: January 21, 1992

1. The resource class schedule for the 2nd semester is as follows:

Period	Subject	Teacher	Aide
1	Math	D. Ganyo	C. Redd
2	Reading	D. Ganyo	C. Redd
3	Language Arts	D. Ganyo	C. Redd

2. Within the above schedule, Mr. Ganyo is to arrange for a 45 minute conference period and a 30 minute, "duty free" lunch during periods 3, 4, advisory, 5, and 7. Content mastery services will be provided during period 1 - 7.

3. At any time that students with an ED handicapping condition are assigned to a resource class, the resource teacher may request services from the ED teacher.

cc: Cano

March 30, 1992

TO: Mr. James Lehmann, Superintendent
FROM: Milton Witt, Principal
SUBJECT: Employee Conference, Dr. Dwaine Ganyo

1. On Thursday, March 26, 1992, copies of the letter to the Seguin ISD and the letter to Dr. Dwaine Ganyo from Mr. Walter Rambo (TEA) were given to me by Jose Cano.

2. In order to provide "corrective action" in a timely manner, a teacher - principal - director of special education conference was scheduled for 3:35 p.m., Friday, March 27, 1992. Dr. Ganyo was notified of this conference at 5:00 p.m., Thursday, March 26, 1992. Dr. Ganyo was reminded of the conference at 3:40 p.m., March 27, 1992; at this time I went to his classroom and asked him to come to the office for the conference.

3. Mr. Cano asked Dr. Ganyo if he had received the letter from Mr. Rambo. Dr. Ganyo answered in the affirmative. Mr. Cano then proceeded to explain the letter the district had received from Mr. Rambo and the implications of "recommended corrective action."

4. "Immediate action" taken by the district was to include a letter, signed by Dr. Ganyo, stating that he (Dr. Ganyo would "provide the needed instruction to special education students assigned to (him) as required in their IEP's." After

reading the letter, Dr. Ganyo refused to sign the letter, indicating his intent to provided needed instruction. Dr. Ganyo's desire was to discuss the situation on Monday.

5. Mr. Cano explained the urgency and pointed out the fact that Dr. Ganyo was in fact the person who sent the letter of complaint to TEA, as well as to a member of the SISD board of trustees.

6. Dr. Ganyo still refused to sign the letter.

7. Further, he stated that he did not in fact give his "letter of complaint" to Mr. Trinidad, but did give it to Mr. Sam Flores, who in turn gave it to Mr. Trinidad.

8. At this point, I informed Dr. Ganyo that Mr. Flores was not in the employee complaint process and that giving the letter to his was not appropriate. His response was that he was not filing a formal complaint, but was taking the issue past the Assistant Superintendent of Instruction.

9. After repeated efforts to convince Dr. Ganyo to sign the letter and his subsequent refusal, the letter was read to Dr. Ganyo in the presence of Mr. Cano. A statement was added to the letter and signed by Mr. Cano and me.

10. At this point the conference was terminated and Dr. Ganyo was informed

that Mr. cano would present this evidence to his superiors.

11. Dr. Ganyo was further informed that a conference regarding his appraisal would he held at a later date.

<Respondent School District's Letterhead>

March 27, 1992

Mr. Walter Rambo
Director of Complaints Unit
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

Dear Mr. Rambo:

My signature below attests to meeting with district administrators, and agreeing to follow district directives concerning my teaching assignment. I will provide the needed instruction to special education students assigned to me as required in their IEP's.

Sincerely,

Dr. Dwaine Ganyo

March 27, 1992

The above letter was read to Dr. Ganyo by Milton Witt in the presence of Mr. Jose Cano. Dr. Ganyo was asked if he could provide the needed instruction to special education students assigned to his unit as required in their IEP's. He refused to sign this letter.

Jose Cano Director Special Education	Milton Witt Principal JF Saegert Middle School

<Respondent School District's Letterhead>

Dr. Dwaine Ganyo
4308 Lazy Oak Drive
Schertz, Texas 78514

April 3, 1992

Dear Dr. Ganyo:

This letter is to advise you of two things; first, that the administrative staff will RECOMMEND to the Board of Trustees THAT YOU BE DISMISSED IMMEDIATELY. The reason for his recommendation in that you have repeatedly not complied with administrative directives. Specifically, you have not provided the written assurances that were requested of you by Mr. Milton Witt and Mr. Jose Cano, or by me: that you would carry out the special education Individual Education Plans (IEPS) of the students assigned to you. This constitutes insubordination.

The second purpose of this letter is to inform you that you are SUSPENDED with pay, EFFECTIVE TODAY, PENDING DISMISSAL BY THE BOARD.

A copy of Board policy DOAC (Termination or Suspension During Contract) is attached for your information and use.

Sincerely,

James D. Lehmann
Superintendent

attachment: Copy of Board Policy DOAC

ACKNOWLEDGEMENT OF RECEIPT:

Dwaine Ganyo	April 3, 1992

cc: David Arnold, Asst. Supt., Personnel and Pupil Services, Dee Carter, Asst. Supt., Curriculum and Instruction, Milton Witt, Principal, Saegert Middle School, Jose Cano, Director, Special Instructional Services

IN THE UNITED STATES DISTRICT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DWAINE GANYO, Plaintiff	§	
V.	§	
	§	CAUSE NO.
	§	SA-93CA203
SEGUIN INDEPENDENT SCHOOL DISTRICT, JAMES LEHMAN, MILTON WITT, TIMOTHY FOX, NANCY EWALD, BILL FENNELL, RAY SINECEK, AND LIONEL (SKIP) MENO, TEXAS COMMISSIONER OF EDUCATION, Defendants	§	

AFFIDAVIT IN SUPPORT OF
RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Before me the undersigned authority on this day personally appeared Dr. Dwaine Ganyo, known to me to be the person executing this affidavit, and being by me duly sworn, does deposeth and sayeth as follows:

1. My name is Dr. Dwaine Ganyo. I am the plaintiff in Cause No. SA-93CA203 in the United States District Court for the Western District of Texas. I am over 21 years of age, of sound mind, and fully competent to make this Affidavit. The statements contained in this Affidavit are true and correct within my personal knowledge.

I have reviewed the transcripts of proceedings from the termination hearing

before Seguin Independent School District Board of Trustees and the appeal hearing before the Hearing Officer at the Texas Education Agency. I was present during those proceedings. My testimony at both the local hearing and the Texas Education Agency hearing was true and correct within my personal knowledge and my testimony and statements are accurately transcribed in the transcripts filed herewith.

Attached hereto as Exhibit A is a true and correct copy of my letter of complaint to the Texas Education Agency. Attached hereto as Exhibit B is a true and correct copy of the memorandum I received on or about January 21, 1992 which was admitted into evidence at the local hearing as Exhibit A #1. Attached hereto as Exhibit C is a true and correct copy of a memorandum of March 30, 1992 addressed to Mr. James Lehman from Mr. Milton Witt which was admitted into evidence as Exhibit A #5 at the local hearing. The statements set forth in parts four and five of this memorandum are essentially a true and correct, although incomplete, account of the statements made at the meeting of March 27, 1992 between Mr. Witt, Mr. Cano, and myself. Attached hereto as Exhibit D is a true and correct copy of the letter I was ordered to sign by Mr. Cano and Mr. Witt which was admitted into evidence at the local hearing as Exhibit A #6. Attached hereto is Exhibit E is a true and correct copy of an April 1, 1992 memorandum I received from Mr. David Arnold which was admitted into evidence at the local hearing as Exhibit A #7. Attached hereto is Exhibit F is a true and correct copy of the letter of April 3, 1992 I received from Superintendent Lehman, admitted into evidence as Exhibit A #8 at the local

hearing. Exhibit F hereto is the only notice of proposed or recommended termination I received from Seguin Independent School District.

I was employed by Seguin Independent School District as a special education teacher for the 1991-92 school year. I hold a doctorate in Educational Administration from the University of Minnesota at Minneapolis. I had taught five years in Edgewood Independent School District as a special education teacher. I had previously served as a social studies teacher, English teacher, physical education teacher, coach, curriculum director, and principal in various other school districts in the United States. When I was hired by Seguin Independent School District I was informed that Seguin wished to transition their special education program for learning disabled students from resource classes to content mastery classes. A resource class is a special education class where a student receives all instruction in a particular subject from the special education teacher for a full period. The content mastery program is a placement for learning disabled students where the students take the regular subjects from regular education teachers but go to the content mastery room for additional assistance in particular subjects. These content mastery students may arrive at the special education room at any time during the period in which they are taking a subject in which they are to receive content mastery services. The placement of the students in content mastery or resource was set forth in documents entitled Individual Education Plans, or IEP's. I taught exclusively in the content mastery program for the first semester.

I was committed to the content mastery program and promised my students and their parents the I would do all I could to assist the students in passing their courses if the students were willing to apply themselves. To this purpose I voluntarily relinquished my conference period and lunch period to work with the students.

During the fall of 1991 some of the learning disabled students were not successful in all courses. For that reason three resource classes were created for some of these students and these classes were assigned to me by Defendant Witt by memorandum dated January 21, 1992. That memorandum required me to provide content mastery services during the same periods when I would be teaching the resource classes.

Because I believed that it would be impossible to fulfill the role of content mastery instructor while I was also responsible for delivering a full lesson cycle to the resource students, because I did not believe that it would be reasonable under these circumstances to expect the student to reach the seventieth percentile of achievement as required by their IEP's, and because I did not believe that any other teachers were required to teach two classes at the same time and that no other students were subjected to such diluted services, I protested the assignment. My efforts to contest the assignment within the Seguin administration were unsuccessful. I performed the assignment for the fourth six weeks of the year.

I believed and continue to believe as a matter of conscience and opinion that the

IEP's of the students could not be fulfilled or "carried out" under the circumstances of my assignment. I had up to six or seven students in the resource classes when the content mastery students were arriving for individual services.

Because my efforts to resolve the matter administratively were unsuccessful and because my students' performance was suffering, I filed a formal complaint with the Texas Education Agency. In my complaint I stated that I was "unable to carry out the IEP's for [my] L.D. students." I referred to my dual teaching assignment and the adverse effects thereof on the students' grades. I further asked why such a combination of assignments was appropriate with a class of 75% hispanic students if it is not done with students "at the other end of the 'exceptional child' continuum." I understood that the district was legally required to implement the IEP's of its students.

The TEA investigator never contacted me to discuss the district's response or to request any further information. In fact there were up to seven resource students in one of my classes, and we averaged about six content mastery students per period but in sixth period we had as many as 13.

The Texas Education Agency then issued its findings in correspondence to both the district and myself. TEA demanded "documentation to show that the district has taken immediate action to provide these students the services that are outlined on their IEP's." As far as I know, it was the district that chose to attempt to satisfy this

requirement for documentation by demanding an "assurance" from me. There were other alternatives to this approach. A directive could have been given to me regarding the manner in which I was to conduct my class and then Mr. Cano could have provided an assurance to TEA that, in his opinion, the IEP's were being implemented.

I did not agree that the methodology suggested by Mr. Cano would "carry out" the students' IEP's, in part because I believed that the resource students, who had failed a course two six weeks in a row, needed a full class period of attention from the certified teacher in order to "carry out" their IEP's. I further believed that the content mastery students needed an average of at least five to seven minutes with the certified teacher each time they came to the room in order to "carry out" their IEP's. Thus while I never refused to comply with any directive regarding the performance of my duties, I would not have agreed to state that Mr. Cano's approach was proper or sufficient. I further believed that the district's approach to the situation was at least racially insensitive and, in my opinion discriminatory, since almost all of my students were minorities.

On March 27, 1992, I was called to a meeting with Mr. Cano and Mr. Witt.

At the local hearing Mr. Witt testified that he told me as follows:

> ... the school district would need to provide TEA with some assurance that this was in fact being

> done, and that assurance would be in the form of a memo from Dr. Ganyo that would say that he would provide instruction as required in the IEP's.

At this conference I was told "we have received information from TEA we're out of compliance because you say you cannot carry out your IEP's. You're the one who created the problem; you're the one who will solve it. So sign this letter." The letter I was directed to sign was Exhibit A-6 at the Local Hearing. I refused to sign the letter and the matter proceeded toward termination.

I was then called to a meeting with the Personnel Director, Mr. Arnold, and Mr. Witt on March 31, 1992. I stated to Mr. Arnold that "it was not possible to accomplish the IEP's with the assignment of the combination of mastery learning and resource students." The district's demand was changed somewhat at this point; Mr. Arnold asked me to provide written assurances to him that I "would carry out the IEP's for those students."

I did not believe that I could sign the statement demanded of me by Mr. Arnold because it was not true in my opinion.

Three days later the superintendent issued me a notice that my termination would be recommended to the Board of Trustees. The reason for the recommendation was stated as follows:

> Specifically, you have not provided the written

> assurances that were requested of you by Mr. Milton Witt and Mr. Jose Cano, or by me: that you would carry out the special education Individual Education Plans (IEPs) of the students assigned to you. This constitutes insubordination.

At the board hearing conducted April 16, 1992, the district's counsel made perfectly clear that I was being fired because I had not submitted the "written assurance." At this hearing I circled the word "needed" on the letter demanded of me by Witt and Cano, and made it clear that I had an objection to the word "needed". I told the Board that my aide and I were "trying to do both at the same time, but there is no way that I can get those kinds of results that you just heard doing both at the same time." I stressed to the Board that I "did not and would not and never will refuse to carry out the IEP's for [my] students." I explained that carrying out the IEP's the first semester meant considerable success with the students and writing "a letter saying that I could do it as well as I did first semester - carry it out to the best of my ability - would be a lie." Again I stated: "I refused to sign a paper. I didn't refuse to do the job."

My actual conduct was not at issue because the district's counsel objected to testimony "not relevant to the issue of whether or not you refused to sign the assurance that was requested from you."

Nevertheless, Mr. Cano agreed that I did follow instructions. Further, Mr. Cano said: "he never refused saying that he was not going to do it. He just kept saying that he could not do it." Mr. Cano also testified that I stated "that it was an impossible situation that could not be carried out ...." Similarly, Ms. Redd testified at the local hearing that I helped her with the content mastery students as much as I could, and that I "did my job" and did not refuse to do it but just stated "I can't." Mr. Arnold also testified at the local hearing that I stated that " the assignment was not possible."

When asked whether the recommendation for proposed termination had anything to do with the fact that I had filed a complaint with the Texas Education Agency, Mr. Arnold responded: "That is a hard question to answer." Mr. Arnold further testified that had I provided them with the written statement of the assurances there would not have been a recommendation for proposed termination.

At the local hearing the March 20 letters from the Texas Education Agency were entered into evidence as Exhibits A-3 and A-4, the March 30 memorandum to Mr. Lehman from Mr. Witt was admitted into evidence as Exhibit A-5, the letter initially demanded of me was admitted as A-6, Mr. Arnold's memorandum of April 1, 1992 was admitted as A-7, and the notice of recommendation of termination letter dated April 3, 1992 was admitted as A-8. The Board then voted to terminate me.

At the time of the local hearing TEA had found the district in compliance according to Mr. Lehman.

_____
Dwaine Ganyo

SWORN TO AND SUBSCRIBED BEFORE ME on this _____ day of April, 1994, to certify which witness my hand and seal of office.

_____
Notary in and for
The State of Texas

_____
(Printed name of
Notary)

My Commission
Expires:_____

ORAL DEPOSITION OF:
MR. JOSE CANO

Taken: March 9, 1994

Page 45, line 8 through page 45, line 14

Q: Well, you told the TEA lady on March 13th that you weren't going to renew Ganyo.

A: Uh-huh.

Q: And you're not sure whether Witt had told you by March 5th as to what his decision was on that?

A: I don't remember.

Q: You compiled with Mr. Witt the reply there that's on the second page of number four; am I right?

A: Yes.

Q: And at the time you two were working on this together, you don't recall whether Witt had told you that he was going to recommend non-renewal?

A: No. And basically the reply -- I wrote this reply and I took it to Mr. Witt to see if there was anything else that he needed to add, if there was anything that he disputed with my reply.

Q: Okay. But up to that point, I'm must asking you to remember back as best you can. Okay?

A: Uh-huh.

Q: Just the chronology of things.

A: Right.

Q: You're talking to him about this guy Ganyo that's been a thorn in your side and you're replying to this memo and I'm just asking you to take yourself back and try to recall whether he had told you prior to that point that he had decided to non-renew him or whether it was after that and before you talked to the TEA lady?

A: I don't know.

Q: It could have been either?

A: It could have been. We had the conversation of his standing many times. But whether we came to a decision, I don't know.

Page 46, line 5 through page 47, line 23

Q: When you talked to the lady at TEA, did you talk to her alternatives for how you could get into compliance?

A: Yes.

Q: And obviously one way of doing it would have been to being in another teacher for one of those kids, one of those classes; right?

A: Exactly.

Q: You didn't have to move Ganyo out to do that; right?

A: Right.

Q: Did you discuss that with her as to whether that would be acceptable?

A: Yes, we did talk about that. It wasn't viable from out standpoint because that would have left him with on one side 23 kids or eight kids for three periods. It's not very cost effective. So that was, you know, rejected very quickly from my part.

Q: Did you also talk about or did you consider, either talk to her about or talk to the other people at the school, about giving Ganyo a very specific directive that said exactly what you wanted him to do in the classroom? And supervising that to ensure that he actually did it and reporting to TEA that Ganyo had been given detailed instructions on how to fulfill the IEPs and were supervising him and he is doing? It.

A: Did I -- you're saying did I talk to Claudia Knowles about that?

Q: Or anybody? The idea that --

A: No, I don't think so.

Q: You testified at the local board hearing and so did Mr. Witt that Ganyo did not refuse to do what he was told, that in

fact he did follow instructions; is that true?

A: In regards to what? I'd have to see that.

Q: On page 39 of local record -- Mr. Guera's . . .

A: Okay.

Q: Do you recall testifying at the local board hearing that Ganyo did follow instructions?

A: Yes.

Q: And that was your testimony at that time?

A: Uh-huh.

Q: Was it true?

A: Yeah, I guess it's true.

Page 59, line 4 through page 61, line 8

Q: But I'm asking you if in terms of what you saw for you to be able to make that representation yourself to TEA, then you would have had to see that Ganyo was working with the content mastery students when they came into the room, at least some, and also teaching the resource class; correct?

A: I would think so.

Q: And if you had seen him do that, then you could have represented to TEA that they were being implemented; right?

A: Right.

Q: Was Ganyo ever given a directive, a written directive to work with the content mastery students when they came in the room and interrupt his instruction to the resource class to do so?

A: Not to my knowledge.

Q: Do you know if he was ever given an oral directive at that point?

A: Not to my knowledge.

Q: Whose idea was the assurance, that he had to sign an assurance? You'll not in TEA's letter here, I ask you to review Exhibit 6, it doesn't say anything about the teacher having to give an assurance, so I'm wondering where that idea came.

A: Because when I spoke -- and I don't know if it was -- I don't know if I spoke to Claudia on two different occasions or one time. I asked her, "Would that satisfy the agency?" And she said, "Yes, that would."

Q: Okay.

A: She said he made the original complaint and he said that he was not implementing and remember I -- asked earlier, I said, "We can work with him and get to the point where he feels comfortable or will

sign an assurance that he is implementing the IEPs. Will that satisfy the agency?" And she said yes.

Q: Now had you talked with anybody else about that idea before then?

A: Before talking to Claudia about it?

Q: Right.

A: No.

Q: So when you-all were discussing alternatives, you asked her if that would work?

A: I told her if that would be one of the viable ways to go.

Q: All right. And she said yes. Then where did it go from there? Who did you speak to then about getting this from Ganyo?

A: I don't remember if I -- it was either Witt or Dee Carter. One of the two.

Q: Okay.

A: Or both. You know, it may have been both.

Q: And they would have confirmed to go ahead and do that?

A: Uh-huh, yes.

Page 86, lines 12 through 19

And that is had you directed him to spend the first part of the period with the resource class, get them ready to turn over to the aid so that he could turn his attention to the content mastery students when they arrived, and he did so and complied with that directive, then in your opinion you would have been in full compliance; am I correct?

A: In my opinion, yes.

SWORN TESTIMONY OF:
DR. JOHN E. KING
University of Texas
Special Education Professor

Taken: October 26, 1992

QUESTIONS BY MR. ARNETT

Page 560, lines 7 through 18

Q: If you'd make that assumption with me. If you'd been presented, as Dr. Ganyo was, the letter enclosed as page 7 of P-2 attesting that he would provide the "needed" instruction assigned to me as required in their IEPs" in the circumstances he was dealing with, do you think he could honestly sign that?

A: In my opinion, he could not.

Q: If he was asked less specifically than in that letter to give an assurance that he would, quote, "carry out the IEPs for those students," do you think he could have honestly done that?

A: In my opinion, I don't think so.

SWORN TESTIMONY OF:
CLAUDIA KNOWLES
Texas Education Agency Investigator

Taken: October 26, 1992

QUESTIONS BY MR. ARNETT

Page 511, lines 19 through 21

Q: You had a conversation with Dr. Cano in addition to this fax you received; correct?

A: Yes.

Page 512, line 23 through page 513, line 8

Q: Did Dr. Cano tell you that they wanted to remove Dr. Ganyo, quote, "right now"?

A: My note indicates that -- my notes says, "Will not be renewed. Want to remove right now."

Q: And a few lines down --

EXAMINER THOMPSON: Now, is that a direct answer to you saying, yes, he did say that or do you have a specific recollection at this time? Independent of your note, do you recall?

THE WITNESS: I believe that that's what he meant.

LOCAL HEARING BEFORE THE
BOARD OF TRUSTEES
Sequin Independent School District

Taken: April 16, 1992

Page 9, lines 12 through 21

OPENING STATEMENT ON BEHALF OF THE DISTRICT

MS. UNDERWOOD: I would just like to make a brief opening statement to the Board regarding what this hearing is about and what it is not about so that we can get that clear from the very beginning.

What this hearing is about is a specific situation in which Dr. Ganyo was asked to provide written assurance that he would implement the IEPs -- and that is a special ed terminology for individual education plan for -- each special ed student has an IEP.

Page 110, lines 10 through 13 and line 25

MS. UNDERWOOD: I said I object on the basis of relevance, that it is not relevant to the issue of whether or not you refused to sign the assurance that was requested from you to --

MS. HAYS: Objection sustained. B-5?

(2)

Supreme Court, U.S.
FILED
NOV 21 1996
CLERK

NO. 96-638

In the Supreme Court of the United States
October Term, 1996

DWAINE GANYO,
Petitioner,

v.

SEGUIN INDEPENDENT SCHOOL DISTRICT, JAMES LEHMAN, MILTON WITT, TIMOTHY FOX, NANCY EWALD, BILL FENNELL, RAY SIMICEK, AND LIONEL (SKIP) MENO, TEXAS COMMISSIONER OF EDUCATION,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION BY RESPONDENTS SEGUIN INDEPENDENT SCHOOL DISTRICT, LEHMAN, WITT, FOX, EWALD, FENNELL, AND SIMICEK

WALSH, ANDERSON, UNDERWOOD,
SCHULZE & ALDRIDGE, P.C.
P.O. Box 2156
Austin, Texas 78768
Telephone: (512) 454-6864
Facsimile: (512) 467-9318
ERIC W. SCHULZE
Counsel of Record
NAN P. SEIDENFELD

35 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly concluded that Petitioner Ganyo failed to show reversible error in his appeal from an adverse summary judgment.

2. Whether the courts below properly applied Supreme Court First Amendment precedent in the context of a public employee whose employment was terminated when he repeatedly refused to provide his employer a written assurance that he would perform the lawful and reasonable job assignment for which he was hired, after the employee's acknowledged failure to perform his job assignment had placed his employer in violation of federal law.

3. Whether Petitioner Ganyo's claim under the Rehabilitation Act correctly was decided against him, either because he lacked standing or for other independent reasons.

LIST OF PARTIES

The parties to this case are:

(1) Petitioner: Dwaine Ganyo

Counsel for Petitioner:

Mr. Richard L. Arnett
Brim, Arnett & Judge
2525 Wallingwood Drive, Building 14
Austin, Texas 78746

(2) Respondents:

Seguin Independent School District, James Lehman, Milton Witt, Timothy Fox, Nancy Ewald, Bill Fennell, and Ray Simicek

Counsel for Respondents:

Eric W. Schulze (Counsel of Record)
Nan P. Seidenfeld
WALSH, ANDERSON, UNDERWOOD, SCHULZE & ALDRIDGE, P.C.
P.O. Box 2156
Austin, Texas 78768

(3) Respondent: Lionel (Skip) Meno, Texas Commissioner of Education

Counsel for Respondent:

Mr. Dan Morales
Attorney General
Mr. Rodney Greer
Special Assistant Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

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STATEMENT OF THE CASE

Petitioner Ganyo filed suit arising out of the termination of his employment by the Seguin Independent School District (hereafter, the "School District" or "SISD"). In federal court, Ganyo named as defendants: (1) the School District; two SISD administrators, Superintendent James Lehman and Principal Milton Witt; and, four members of the SISD Board of Trustees, Timothy Fox, Nancy Ewald, Bill Fennell, and Ray Simicek (collectively, the "School District Respondents"); and (2) Lionel Meno, the Texas Commissioner of Education. Ganyo raised causes of action against the School District Respondents under both the First Amendment and the Rehabilitation Act.

A Magistrate Judge initially considered the motion for summary judgment filed by the School District Respondents. The Magistrate Judge issued a lengthy memorandum and recommended that summary judgment be granted against Ganyo on his causes under the First Amendment and the Rehabilitation Act (Pet. App. at 9-28). The district court, after conducting a de novo review, accepted the memorandum and recommendation of the Magistrate Judge and granted summary judgment in favor of the School District Respondents (Pet. App. at 4-8). In an unpublished opinion, the Fifth Circuit Court of Appeals found that Ganyo presented no reversible error on appeal and affirmed the judgment of the district court (Pet. App. at 1-2).

The School District Respondents respectfully oppose Ganyo's Petition for Writ of Certiorari. The Petition repeatedly misstates both fact and law. Pursuant to United States Supreme Court Rule 15.1, the School District Respondents bring the following misstatements to the attention of the Court.

A. GANYO'S PETITION MISSTATES, OR FAILS FULLY TO STATE, THE DISPOSITION OF HIS CAUSES OF ACTION BY THE COURTS BELOW

When addressing the "nature of the case," Ganyo's Petition misstates, or fails fully to state, the disposition of his causes of action by the courts below (Petition at 6).

(1) GANYO MISSTATES THE DISPOSITION OF HIS CAUSE OF ACTION UNDER THE FIRST AMENDMENT

Regarding his First Amendment cause of action, Ganyo erroneously states that "[t]he lower courts have failed to address Petitioner's right to refuse to speak" (Petition at 6). Contrary to Ganyo's assertion, the Magistrate Judge fully addressed Ganyo's "refusal to speak" in the context of the employer-employee relationship of this case. Ganyo's "refusal to speak" occurred when (1) the School District reasonably required an assurance from Ganyo that he would do the job for which he had been hired, because his acknowledged failure to do his job had placed SISD in violation of federal regulations concerning the education of disabled students, and (2) Ganyo refused to sign a letter of assurance that he would do his job and provide the instruction required by his disabled students.

Ganyo's assertion that the lower courts failed to address his "refusal to speak" is belied by the memorandum and recommendation of the Magistrate Judge. The Magistrate Judge detailed the summary judgment evidence concerning Ganyo's refusal to sign the letter of assurance requested by SISD (Pet. App. at 10-12, 18-23). The evidence established that Ganyo's refusal to provide the letter of assurance (i.e., his "refusal to speak") (1) "directly affected both [Ganyo's] specific duties and the school district's mission in educating its

children," (2) threatened the School District with "losing its accreditation from the state," and (3) "had a direct and substantial impact on the ability of the school district to carry out its educational mission" (Pet. App. at 21-22). The Magistrate Judge expressly concluded:

> [Ganyo's] speech interests, including his 'refusal to speak', are outweighed by the school district's interests in efficient education.

(Emphasis added.)(Pet. App. at 23). In turn, the district court accepted the memorandum and recommendation of the Magistrate Judge and granted summary judgment, and the Fifth Circuit affirmed that summary judgment.

The courts below explicitly addressed Ganyo's First Amendment cause of action based upon a refusal to speak. For Ganyo now to claim that "[t]he lower courts have failed to address Petitioner's right to refuse to speak" (Petition at 6), wholly misstates the disposition of his First Amendment cause of action by the courts below.

(2) GANYO MISREPRESENTS THE DISPOSITION OF HIS CAUSE OF ACTION UNDER THE REHABILITATION ACT

Regarding his Rehabilitation Act cause of action, Ganyo misrepresents the disposition of that cause by the Fifth Circuit Court of Appeals. Ganyo erroneously states that "the Court of Appeals left standing the Magistrate Judge's ruling that Dr. Ganyo has no standing to sue under the Rehabilitation Act because he himself is not disabled." (Petition at 6). To the contrary, the Fifth Circuit simply found that Ganyo presented "no reversible error" on appeal (Pet. App. at 2).

In the Court of Appeals, the School District Respondents raised and argued in their brief three, separate, independent bases upon which the Fifth Circuit could affirm the summary judgment against Ganyo on his claim under the Rehabilitation Act. Only the first of those three bases asserted that Ganyo lacked standing under the Rehabilitation Act. *Alternatively*, the School District Respondents asserted that even if Ganyo had third-party standing under the Act, his claim failed either because (1) in all of Ganyo's complaints, he complained of actions taken against *him*, not against his disabled students, *or* (2) the summary judgment evidence established that the decision to terminate Ganyo's employment was based upon his refusal to provide the requested letter of assurance and was not based upon retaliation for his filing of complaints.

Ganyo misrepresents the disposition of his cause of action with his erroneous statement that "the Court of Appeals left standing the Magistrate Judge's ruling that Dr. Ganyo has no standing to sue under the Rehabilitation Act" (Petition at 6). To the contrary, the Fifth Circuit could have concluded that Ganyo presented "no reversible error" even if he had standing to sue, because summary judgment under the Rehabilitation Act was proper based upon one of the independent alternative grounds raised and argued by the School District Respondents.

B. GANYO'S PETITION MISSTATES FACTS AND ATTEMPTS SELECTIVELY TO OMIT OTHER PERTINENT FACTS

The memorandum and recommendation of the Magistrate Judge correctly states the facts established by the summary judgment evidence (Pet. App. at 9-28). Ganyo's statement of the "Facts of the Case," as contained in his Petition, selectively omits pertinent facts established by the

evidence and affirmatively misstates other facts (Petition at 6-9). As contained in the Record ("R") on appeal before the Fifth Circuit, the facts are as follows:

Dwaine Ganyo was employed by the Seguin Independent School District as a special education teacher for the 1991-92 school year to teach students with disabilities (R. at 389). For the first semester of the 1991-92 school year, Ganyo was assigned to teach "content mastery" to 31 disabled students (R. at 389).

"Content mastery" is a program for teaching students with disabilities (R. at 389, 600). The disabled students take regular subjects from regular education teachers, but they go to the content mastery room for additional assistance in particular subjects from the special education teacher (R. at 389).

At the end of the first semester when 8 of the 31 students were not successful under the content mastery program and were failing, meetings of the students' Admission, Review and Dismissal (ARD) committees were held to review the Individual Education Plans (IEPs) of those students (R. at 600). In order to ensure a disabled student's right to free appropriate public education, the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq.*, mandates that an IEP be developed and implemented for each child.[1] The IEP is a

---

1. The Fifth Circuit recently described the process in Texas as follows:

> The Individuals with Disabilities Education Act requires states to provide disabled children with a "free appropriate public education" in return for acceptance of federal funds. The student's curriculum is uniquely tailored to the individual student through the annual implementation of an "individualized education

written statement for each disabled student that must include (1) the present levels of educational performance of the child, (2) the annual goals, including short-term instructional objectives, (3) the specific educational services to be provided, (4) the projected date for initiation and anticipated duration of services, and (5) evaluation procedures for determining whether the instructional objectives are being met. 20 U.S.C. § 1401(a)(20).

The ARD committees for the 8 students met to review the students' IEPs and determine their instructional needs (R. at 600). Ganyo attended the committee meetings, as did the parents of the students, and all agreed that the students needed instruction in a "resource classroom" rather than pursuant to the content mastery program (R. at 600).

A "resource class" is a special education class where a student with disabilities receives all of his or her instruction in a particular subject from the special education teacher for a full period (R. at 389).

During the second semester of the 1991-92 school year, Ganyo was assigned to teach resource classes as well as content mastery, i.e., a dual assignment (R. at 390). Such a dual teaching assignment, like Ganyo's, is a common arrangement in

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> program" or "IEP." The IEP is produced by a qualified representative of the local education agency, the child's teacher, the child's parents or guardian, other individuals at the discretion of the agency or the parent, and where appropriate, the child. In Texas, this is called the Admission, Review, and Dismissal (ARD) committee.

(Footnotes omitted.) *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 690-91 (5th Cir. 1996).

Texas school districts (R. at 418, 451, 600). Ganyo would not have had a teaching load large enough for a full time teacher if he were to teach either (1) only the 8 resource class students, or (2) only the remaining 23 content mastery students (R. at 600). However, the combined dual teaching assignment gave Ganyo a "light" full time load when compared to other special education teachers in the School District (R. at 600). Ganyo also had a full time aide to assist him with the dual assignment, something not available to other SISD special education teachers who had considerably heavier teaching loads (R. at 600).

By letter dated March 9, 1992, Ganyo complained to the Texas Education Agency ("TEA") about his dual teaching assignments (R. at 396). In his complaint, Ganyo stated that he was "unable to carry out the IEPs" of his disabled students because of the dual assignments (R. at 396). In the letter, Ganyo also expressed a fear that unless the situation was corrected, students with disabilities could fail (R. at 396).

TEA responded to Ganyo by letter dated March 20, 1992 (R. at 453). TEA's letter to Ganyo included the following:

> The [content mastery and resource] teaching assignment that you describe does not violate any rule or regulation for which this Agency has responsibility. In fact, this arrangement, as you describe it, does not appear to be unreasonable or unmanageable.
>
> In your letter, you state that your inability prevents you from carrying out the IEPs. The district staff verify that you are not implementing the IEPs.

Position of the Texas Education Agency
Authority: 34 C.F.R. 300.342(b)

> Due to your failure to implement the IEPs of the students, the district is in violation of federal regulations. Due to the serious nature of this issue, immediate corrective action will be required of the district.

(R. at 453).

By separate letter also dated March 20, 1992, TEA wrote the Superintendent of the School District regarding Ganyo's failure to implement the IEPs of his students (R. at 455). TEA informed the District of the necessary corrective action:

> Within two weeks of the date on this letter, submit documentation to show that the district has taken immediate action to provide these students the services that are outlined on their IEPs.

(R. at 455).

In other words, two so-called violations were raised by Ganyo's March 9th complaint to the Texas Education Agency. (1) TEA did not find any violation concerning Ganyo's teaching assignments. The evidence established that the dual assignment about which Ganyo complained was a common practice (R. at 418, 451), which TEA found violated no rule and was neither unreasonable nor unmanageable (R. at 319, 453). (2) Nevertheless, TEA did find a violation based on Ganyo's complaint. The violation TEA found as a result of Ganyo's complaint, however, was that Ganyo, himself, was failing to

implement the IEPs of his students, which, in turn placed the School District in violation of 34 C.F.R. § 300.342 (R. at 318-20, 455).

In response to TEA's finding of non-compliance by the School District due to Ganyo's failures, the District then sought Ganyo's assurance that he would provide the needed instruction to his students as required by their IEPs, but Ganyo refused to provide any such assurance (R. at 400). For example, a conference was held by SISD administrators with Ganyo on Friday, March 27, 1992. As a memorandum concerning that conference reflects, at the conference (1) the District attempted to respond to the "immediate action" TEA demanded, (2) Ganyo was directed to provide the requested assurance to TEA, and (3) Ganyo refused to provide the requested assurance and wanted "to discuss the situation on Monday." (R. at 398). By the date of the Friday conference, of course, the district had only one week to provide TEA with documentation showing that it indeed had taken immediate action to correct Ganyo's failure to implement the IEPs of his students and to provide the students the services their IEPs required (R. at 455). The conference memorandum reflected that there was an "urgency" requiring the assurance from Ganyo (R. at 398). The urgency of a timely response to TEA and the possibility of sanctions against the District were explained to Ganyo (R. at 317).

Ganyo misstates the facts established in the Record. Ganyo erroneously states that "Respondents' only assertion of 'disruption' resulting from Dr. Ganyo's refusal to sign the assurance was 'because without this assurance, TEA was threatening to sanction the school district.'" (Petition at 19). To the contrary, Ganyo's refusal to provide the requested assurance disrupted and threatened the District's ability to comply with federal law and to provide appropriate education to his special education students. The School District was in

violation of federal regulations "[d]ue to [Ganyo's] failure to implement the IEPs of [his] students." (R. at 453). Ganyo's refusal to provide the requested assurance disrupted and threatened the efficient operations of the District. "[I]t jeopardized the District's accreditation with TEA" (R. at 315). "[I]t threatened to have accreditation of [SISD's] education program suspended by TEA" (R. at 317). "[I]t required replacing Dr. Ganyo with a teacher who would perform his job duties to the satisfaction of TEA" (R. at 317). In order to ensure the educational integrity of its special education program, the District would have to "replace [Ganyo] with someone who would agree to teach school children as required by state law and enforced by TEA" during the middle of the school semester (R. at 322).

The School District attempted to persuade Ganyo to comply with administrative directives regarding his assignment and to provide the assurance to the TEA, but he did not work with the content mastery students as directed or sign any assurance. (R. at 401, 415, 446-47).

On April 3, 1992, the Superintendent recommended that Ganyo's employment be terminated because of his failure to comply with administrative directives that Ganyo provide the requested assurance to TEA that he would provide the needed instruction to carry out the IEPs of the disabled students assigned to him (R. at 402). Prior to his termination, Ganyo was afforded an evidentiary hearing before the school board (R. at 404-640). The decision of the SISD school board members to terminate Ganyo's employment was based upon a finding of Ganyo's refusal to follow administrative directives in providing the assurance requested of him and was not based upon his complaints (R. at 327-38).

REASONS FOR DENYING THE PETITION

A. GANYO SEEKS REVIEW OF AN UNPUBLISHED DECISION WHICH FOUND ONLY THAT HE PRESENTED "NO REVERSIBLE ERROR" ON APPEAL

Ganyo's Petition presents the Supreme Court with a case that will not affect other potential litigants. The unpublished Fifth Circuit opinion establishes no precedent for other litigants, even under the local rules of that Court. The sum and substance of the two paragraph, per curiam opinion was simply the following: (1) Ganyo contended on appeal that the district court erred in granting a summary judgment against him on the various causes of action that he had raised, yet (2) the Court of Appeals found only that he had presented "no reversible error." (Pet. App. at 1-2).

The Fifth Circuit's Local Rule 47.5.1 provides that "opinions that may in any way interest persons other than the parties to a case should be published" and sets forth the criteria for publication. The Court of Appeals' opinion was not published and does not in any way interest persons other than Ganyo and the numerous parties he sued. In a footnote to its opinion, the Fifth Circuit included its standard legend, as mandated by Local Rule 47.5.4 of that Court, concerning unpublished opinions:

> Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

(Pet. App. at 1-2). Even under the limited circumstances set

forth in the local rules of the Fifth Circuit, an unpublished opinion which simply states that "no reversible error" has been presented on appeal will not serve as precedential value for any court.

The present case was decided by summary judgment, turned upon its own narrow set of facts, and would affect few persons other than the instant litigants even if any of the lower courts had published their opinions. In effect, Ganyo presents the uniquely absurd argument that because he was a "whistleblower" who blew the whistle on his own job performance, the First Amendment should shield him from being required to acknowledge that he will perform the job for which he was hired. Ganyo's arguments stand the very concept of whistleblowing on its head, giving protection to a person who commits a wrong because that very person blows the whistle on himself.

Ganyo's Petition seeks review of an unpublished opinion that contains no precedential value and which simply attempts to ignore the narrowly drawn focus presented by the facts and arguments of this case. The Petition fails to present any matter of overriding national importance to the Court for review. The writ of certiorari should be denied.

B. GANYO ENGAGES IN A FLAWED ANALYSIS OF THE PROTECTED NATURE OF HIS SPEECH UNDER THE FIRST AMENDMENT, WHEN HE ATTEMPTS TO IGNORE THE EMPLOYER-EMPLOYEE CONTEXT IN WHICH THE SPEECH AROSE

When addressing his First Amendment freedom of speech claim, Ganyo asserts that the courts below "entirely

misevaluated" the protected nature of his speech (Petition at 14). To the contrary, it is Ganyo, not the courts below, who fails properly to evaluate the First Amendment protection afforded public employees under the precedent of this Court. Ganyo erroneously attempts to wrap his arguments around speech cases that are not applicable to the present case. Ganyo's Petition is founded upon a fundamental analytical flaw that is repeated throughout the Petition. Ganyo's arguments fail to distinguish between (1) cases in which the state (or one of its political subdivisions) acts in its role as a sovereign, and (2) cases in which the state acts in its role as an employer.

The distinction is critical, because "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). "[T]he government as employer indeed has far broader powers than the government as sovereign." *Waters v. Churchill*, ___ U.S. ___, 114 S.Ct 1878, 1886, 128 L.Ed.2d 686 (1994)(O'Connor, J., plurality opinion).

In the present case, it is undisputed that the School District Respondents were acting in their role as employer when Ganyo's employment was terminated. As the Magistrate Judge noted, the present case cannot be divorced from the context of the employer-employee relationship:

> If every teacher were allowed to determine whether his work assignment was appropriate, and then refuse to carry out that assignment when he determined in his opinion that the assignment was excessive or otherwise inappropriate, the ability of a school district to

> effectively carry out its educational mission would be divested. [Ganyo] was free to continue to speak out regarding the appropriateness of his assignment; he was not free to disregard his employer's directives so as to do what he perceived to be his job in the manner in which he felt it ought to be done.

(Pet. App. at 22).

The present case does not involve the role of the School District Respondents in their exercise of sovereign powers. Nevertheless, the vast majority of the First Amendment cases relied upon by Ganyo and cited in his Petition precisely involve the role of the state as sovereign. *See, e.g., West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)(state law compelling students to salute the flag); *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989)(application of flag burning to a state law criminalizing the desecration of venerated objects); *Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988)(state law requiring professional fundraisers to make certain disclosures to potential charitable donors); *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977)(state statute criminalizing the act of obscuring the state motto, "Live Free or Die," on automobile license plates); *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)(application of a state unemployment compensation law to persons engaging in the sacramental use of prohibited drugs); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d. 305 (1992)(city 'hate crimes' ordinance criminalizing cross-burning based on race).

Instead of involving the power of the sovereign, the present case involves the employer-employee relationship between the School District Respondents and Ganyo. The School District was charged by law with ensuring that its disabled students would be educated according to the requirements of their Individual Education Plans, and SISD hired Ganyo to help perform that task. "[C]onstitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign." *Waters*, ___ U. S. at ___, 114 S.Ct. at 1887. As articulated by Justice O'Connor:

> [T]he extra power the government has in this area comes from the nature of the government's mission as employer. Governmental agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. ...
>
> The key to the First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Id., ___ U.S. ___, 114 S.Ct. at 1887-88.

Ganyo's Petition refuses to acknowledge the difference

in the speech cases between the state's role as sovereign and the state's role as employer. In its role as employer, the state has far broader powers and its interests in achieving its goals are elevated to a significant level.

As this Court has stated, "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick v. Myers*, 461 U.S. 138, 149, 103 S.Ct. 1684, 1691, 75 L.Ed.2d 708 (1982). Nevertheless, Ganyo asserts that "*Connick v. Myers* is inapplicable to this case" (Petition at 13). Even the dissenting opinion in *Connick*, like the majority opinion, drew a line beyond which an employee's refusal to cooperate with his employer is unprotected:

> Perhaps the simplest example of a statement by a public employee that would not be protected by the First Amendment would be answering "No" to a request that the employee perform a lawful task within the scope of his duties. Although such a refusal is "speech," which implicates First Amendment interests, it is also insubordination, and as such it may serve as the basis for a lawful dismissal.

(Emphasis added.) *Id.*, 461 U.S. at 163, n. 3, 103 S.Ct. at 1699, n. 3 (Brennan, J. dissenting). *See also, MacAdams v. Matagorda County Appraisal District*, 798 F.2d 842, 845 (5th Cir. 1986)(public employee properly terminated for his refusal to "cooperate with or follow the biddings of his employers"); *Berry v. Bailey* 726 F.2d 670, 676 (11th Cir. 1984)(deputy sheriff properly terminated when he "flatly refused" to follow the lawful request of his supervisor).

This Court cannot ignore, as Ganyo would have it, the context of the employer-employee relationship. The present case is not about forcing the public to adhere to ideological points of view or prescribing what is to be the orthodox view in matters of opinion in areas of public import. Instead, the present case is about a public employer's right to secure from one of its employees the assurance that he will carry out his job assignments so as to avoid sanctions being imposed upon the employer by a higher authority. The School District did not seek to coerce an expression of opinion from Ganyo; it sought to obtain his assurance that he would do his job as assigned. Ganyo refused to provide any such assurance.

Ganyo was given a teaching assignment that required him to provide content mastery and resource instruction to disabled students in the same setting. Ganyo came to the conclusion that he could not do so and complained to the Texas Education Agency, despite the facts that (1) he was assisted by a full-time aide in the classroom, and (2) such a dual assignment was a common practice. TEA concluded that the assignment was neither unlawful nor inappropriate, and that Ganyo's failure to implement his students' IEPs was a very serious matter requiring immediate corrective action on the part of the School District. The School District gave Ganyo the opportunity, not just once but on several occasions, to provide assurances that he would follow District directives concerning his teaching assignment and provide the needed instruction to his students. His refusal to do so was in effect a refusal to carry out his duties as assigned. Under his contract of employment, Ganyo was subject to dismissal for not complying with administrative directives.

When addressing his First Amendment freedom of speech claims, Ganyo's Petition is founded upon a flawed analysis that fails (1) to distinguish between speech cases

concerning the state's role as a sovereign and those in which the state acts in its role as an employer, and (2) to address the consequences of that distinction. The writ of certiorari should be denied.

C. WHEN ADDRESSING THE BALANCING OF THE PARTIES' COMPETING INTERESTS UNDER THE FIRST AMENDMENT, GANYO MISSTATES THE INTERESTS OF THE SCHOOL DISTRICT RESPONDENTS

The courts below balanced the parties' competing interests and granted summary judgment in favor of the School District Respondents on Ganyo's First Amendment speech claim:

> [Ganyo's] speech interests, including his "refusal to speak", are outweighed by the school district's interest in efficient education. Therefore, summary judgment should be granted as to [Ganyo's] free speech claims.

(Pet. App. at 23). The courts below did not misapply the balancing test. Ganyo's Petition simply attempts to misstate the interests of the School District Respondents that were weighed in the balance.

The test at issue involves the balance struck between a public employee's First Amendment speech interest and the government's interest "in promoting the efficiency of the public service it performs through its employees." *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1735. In *Pickering*, the Supreme Court issued a caveat to its decision: because of the "enormous variety of fact situations" the Court did "not deem it either appropriate or feasible to lay down a general standard" of the relevant

factors to balance in all First Amendment cases. *Id.*, 391 U.S. at 569, 88 S.Ct. at 1735.

Ganyo's Petition misstates the interests of the School District Respondents that were at stake when the courts below applied the First Amendment balancing test. Ganyo erroneously states that "Respondents' only assertion of 'disruption' resulting from Dr. Ganyo's refusal to sign the assurance was 'because without this assurance, TEA was threatening to sanction the school district.'" (Petition at 19).

When applying the balancing test to the summary judgment evidence, the Magistrate Judge detailed the disruption in the efficient educational operations of the School District that resulted from Ganyo's "speech":

> Here, [Ganyo's] refusal to provide any assurance that the IEPs would be carried out directly affected both his specific duties and the school district's mission in educating its students (Docket no. 67, Arnold affidavit, exh. A [R. at 314-15]; Witt affidavit, exh. B [R. at 316-20]; Lehman affidavit, exh. C [R. at 321-26]. Indeed, the school district was threatened with losing its accreditation from the state.

(Pet. App. at 21).

> [T]he context in which [Ganyo] made his expression (refusing to sign an assurance to the TEA) had a direct and substantial impact on the ability of the school district to carry out its educational mission. ...

> ... [Ganyo] ignores the TEA mandate that the SISD provide "documentation" and take "immediate" action to assure that the IEPs were being followed. (Docket no. 67, Lehman affidavit, exh. C, attachment 1). [R. at 324.] The assurance [Ganyo] refused to sign was intended to serve that purpose.

(Pet. App. at 22-23).

The affidavits and their attachments cited by the Magistrate Judge (as quoted above) detailed the following: (1) that TEA found, in response to Ganyo's complaint, that the "documentation indicates that [he] fails to implement the IEPs of his students" (R. at 318); (2) that "due to [Ganyo's] failure to implement the IEPs of [his] students, the district [was] in violation of the federal regulations," a violation deemed to be "serious" by TEA (R. at 319); (3) that TEA required the School District to submit documentation showing that it would take "immediate action to provide students the services outlined in their IEPs," (R. at 317); and (4) that "the urgency of a timely response to TEA and the possibility of sanctions against the District" were explained to Ganyo (R. at 317).

The summary judgment evidence cited by the Magistrate Judge further established the causal relationship between Ganyo's refusal to provide the requested assurance and the disruption to the efficient operations of the School District. Ganyo's refusal to provide the requested assurance disrupted and threatened the District's ability to comply with federal law and to provide appropriate education to his special education students. The School District was in violation of federal regulations "[d]ue to [Ganyo's] failure to implement the IEPs of [his] students." (R. at 453). The summary judgment evidence established that Ganyo's refusal to provide the requested

assurance disrupted and threatened the efficient operations of the District. "[I]t jeopardized the District's accreditation with TEA" (R. at 315). "[I]t threatened to have accreditation of [SISD's] education program suspended by TEA" (R. at 317). "[I]t required replacing Dr. Ganyo with a teacher who would perform his job duties to the satisfaction of TEA" (R. at 317). In order to ensure the educational integrity of its special education program, the District would have to "replace [Ganyo] with someone who would agree to teach school children as required by state law and enforced by TEA" during the middle of the school semester (R. at 322).

In essence, Ganyo's position is this: by *his* making a complaint that is based upon *his* inability to carry out *his* assigned duties, he becomes immune from termination by his employer, even though the agency to which he complained determined that his assignment was legal, reasonable, and manageable. It is a very clever job security strategy: (1) make a complaint that results in a requirement issued by a supervising agency that your employer take corrective action, corrective action that would involve your assuring the agency that you would do what you have been assigned to do and what your employer is paying you to do, (2) refuse to provide any such assurance, and (3) raise as your defense to termination the ramparts of the First Amendment.

Ganyo's position would virtually cripple a public employer's ability to terminate employees who do not do their jobs. All an employee would have to do to constitutionalize incompetence, inability, and/or lack of motivation would be to make a statement to someone in authority that he or she could not do the job, before adverse employment action is taken by the employer. Every attempt to terminate then would have a free speech element, and the interest of the public employer in promoting the efficiency of the public services it provides

through its employees would be effectively destroyed.

As observed by the Magistrate Judge, the facts of the present case are not analogous to *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987):

> All parties acknowledge that the direct reason for [Ganyo's] termination was his refusal to provide an assurance to the TEA that he would implement the student's IEPs. This does not present a situation, such as *Rankin*, where the speech is unrelated to the employee's work and does not interfere with the functioning of the office. ... Here, [Ganyo's] refusal to provide any assurance that the IEPs would be carried out directly affected both his specific duties and the school district's mission in educating its students.

(Emphasis added.)(Pet. App. at 20).

Ganyo does not dispute the finding of the Magistrate Judge that he "was free to continue to speak out regarding the appropriateness of his assignment" (Pet. App. at 22). Ganyo blatantly mischaracterizes the facts with his statement that the School District Respondents attempted to coerce a retraction of the complaints he had made to the Texas Education Agency (Petition at 17). The School District Respondents neither directed Ganyo to quit voicing his opinion nor demanded a surrender of any constitutionally protected opinions. Instead, they simply requested a reasonable assurance from Ganyo that he would do his job as assigned. Thus, Ganyo's situation cannot be compared to his hypothetical scenario of a teacher who is directed to give false testimony or be fired (Petition at 22). As the Magistrate Judge noted, under the logic of the so-called

right Ganyo seeks to enforce, "the ability of a school district to effectively carry out its educational mission would be divested."

Suppose, for example, that state law prohibits school districts from using corporal punishment to discipline students. Suppose further, that a district learns from an editorial that one of its teachers has had published in the local newspaper, that (1) the teacher has violated that law and administered corporal punishment at school, (2) he is adamant in his opinion that paddling students is an appropriate form of discipline, and (3) he asserts that discipline in the district (which has become a topic of public debate) cannot be maintained without corporal punishment. Could the district require the teacher to provide a written assurance that he would perform the required duties of his job and not paddle students in the future? Under Ganyo's erroneous rationale, even though the district does not attempt to restrict the teacher from speaking out about corporal punishment, if the teacher refuses to provide the requested assurance about performing his own job duties he could not be fired. Under Ganyo's view, he could not be fired because the district could not terminate his employment for refusing to provide the requested assurance.

For Ganyo even to attempt to analogize the present case to one in which "corrupt officials ... punish subordinates who blow the whistle" is scurrilous and wholly misleading to this Court (Petition at 20). The cases cited by Ganyo, of course, do not involve plaintiffs who blow the whistle on themselves (Petition at 20). Accepting Ganyo's argument would stand the very concept of whistleblowing on its head, giving protection to a person who commits a wrong because that very person blows the whistle on himself.

Ganyo's Petition misstates the interests of the School District Respondents that were at stake when the courts below

applied the First Amendment balancing test. The courts below correctly weighed the parties' interests when granting and affirming summary judgment against Ganyo on his First Amendment claim. The writ of certiorari should be denied.

D. WHEN ADDRESSING HIS CLAIM UNDER THE REHABILITATION ACT, GANYO FAILS TO ADDRESS THE ALTERNATIVE GROUNDS FOR THE LOWER COURTS' DISPOSITION OF THE CLAIM

To reiterate, Ganyo misrepresents the disposition of his cause of action under the Rehabilitation Act. Ganyo erroneously states that "the Court of Appeals left standing the Magistrate Judge's ruling that Dr. Ganyo has no standing to sue under the Rehabilitation Act because he himself is not disabled." (Petition at 6). To the contrary, the Fifth Circuit could have concluded that Ganyo presented "no reversible error" even if he had standing to sue, because summary judgment under the Rehabilitation Act was proper based upon one of the independent alternative grounds raised and argued by the School District Respondents.

In the district court, the School District Respondents asserted that Ganyo lacked standing to bring his claim under the Rehabilitation Act. The State Commissioner of Education previously had raised the same "lack of standing" issue in a Motion to Dismiss, and the Magistrate Judge already had ruled on that issue in a prior Memorandum and Recommendation (Pet. App. at 39-46). When that same issue then was raised by the School District Respondents, the Magistrate Judge in large part referred to his previous order on the Motion to Dismiss (Pet. App. at 14).

The Magistrate Judge articulated three independent reasons why Ganyo's claim under the Rehabilitation Act would fail. (1) First, Ganyo lacked standing. As the Magistrate Judge correctly observed, Ganyo sought "no relief from these [School District Respondents] that would benefit handicapped students in Seguin or otherwise further the interests the Rehabilitation Act was enacted to protect." (Pet. App. at 14; see also, Pet. App. at 39-43). (2) Second, even if Ganyo had third-party standing under the Act, "Ganyo's claim must fail." (Pet. App. at 43). In all of Ganyo's complaints, "he is complaining of actions taken against him, not against his handicapped or disabled students." (R. 210; RE Tab 7). (3) Third, the Magistrate Judge held that "assuming plaintiff does have standing to assert a Rehabilitation Act claim, the summary judgment evidence establishes, as a matter of law, that he was not terminated in retaliation for his complaint to the TEA." (Pet. App. at 27, n. 11).

Ganyo's brief in the Court of Appeals conceded that "Ganyo was expressly terminated for refusing to sign the assurance" (Brief of Appellant, p. 25). As the Magistrate Judge noted:

> All parties acknowledge that the direct reason for [Ganyo's] termination was his refusal to provide an assurance to the TEA that he would implement his students' IEPs.

(Pet App. at 20).

The summary judgment evidence established that the decision of the SISD school board members to terminate Ganyo's employment was based upon a finding of his refusal to follow administrative directives in providing the requested letter of assurance and was not based upon his complaints (R. at 327-

38). As the Magistrate Judge observed:

> The affidavits submitted by board members Fox, Ewald, Fennell, and Simicek indicate that the decision to terminate [Ganyo's] employment was based upon a finding of his refusal to follow administrative directives, and was not based upon his complaints or association (Docket no. 67, exhs. D-G). [R. at 327-38.] [Ganyo] has submitted no evidence that the school board members who voted for his termination were otherwise motivated.

(Pet. App. at 26).

Ganyo attempts to mislead this Court with his erroneous statement that "the Court of Appeals left standing the Magistrate Judge's ruling that Dr. Ganyo has no standing to sue under the Rehabilitation Act because he himself is not disabled." (Petition at 6). The Court of Appeals could have found that Ganyo's claim under the Rehabilitation Act presented "no reversible error" on appeal for any of three independent reasons, all of which were established in the district court and raised and argued on appeal. The writ of certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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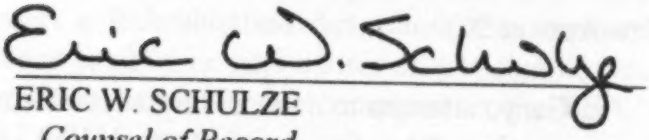

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